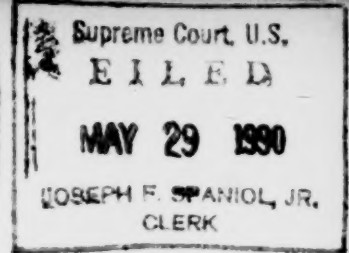


89-1850(3)

NO. _____



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

GEORGE M. & FERRELL S. HORN
PETITIONERS

V.

SMITH & MERONEY, a professional
corporation, and ANNE E. MERONEY,
individually.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT AND COURT OF
APPEALS OF GEORGIA

GEORGE M. HORN, PRO SE

AND

FERRELL S. HORN, PRO SE

COUNSEL OF RECORD

308 Brookside Dr.
Auburn, AL 36830
(205) 821-3616

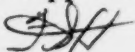


QUESTIONS PRESENTED

1. Can the Supreme Court of Georgia deny the petitioners a Writ of Certiorari when the trial court failed, or refused, to consider the issue of "lex loci delicti" and the Doctrine of Comity when a tort is committed outside the jurisdiction of the courts of Georgia?

Southern R.R. v. Decker, 5GA App. 21, 62 S.E. 678 (1908);

Gulf Collateral, Inc. v. Morgan, 415F. Supp. 319 (S.P. Ga) (1976)

Jackson v. Johnson, 34 Ga. 511, 518 

2. Can the courts of Georgia ignore the fact that a conflict of laws exists between two states and fail to determine and protect the interests of the legal heirs at law, residents of Alabama, by granting a motion for summary judgment and denying a Writ of Certiorari?

Code of Alabama 1975, § 6-5-410 (Wrongful Death).

Code of Alabama 1975, § 43-8-41 et seq (Descent and Distribution)

Code of Georgia 1981, O.C.G.A. § 51-4-1 (Wrongful Death)

Code of Georgia 1981, O.C.G.A. § 53-4-1 (Descent and Distribution)

Code of Georgia 1981, O.C.G.A. § 53-4-30 (Determination of legal heirs and their interests)

3. Can the Supreme Court of Georgia deny a Writ of Certiorari when the trial court grants a Motion for Summary Judgment in a suit which alleges negligence of an attorney representing an intestate estate thereby denying the petitioners the right to the due process of law under the 14th Amendment of the United States Constitution?

Wakefield v. Winter, No. 44761, 121 Ga. App. 259 (1970), 174 S.E.

2nd 178, Judgment #1, 181 (33); Ellington v. Tolar Construction

Co., No. 31176, Sup. Ct. of Ga, 237 Ga 235, July 9, 1976, Judgment

#3, 181 (33) and #5, Negligence 136 (8), 227 S.E. 2nd 236.



PARTIES

The caption contains the names of all parties to the proceeding in the courts below.



TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED _ _ _ _ _	i
PARTIES _ _ _ _ _	ii
TABLE OF AUTHORITIES _ _ _ _ _	vi,vii
OPINIONS BELOW _ _ _ _ _	1
JURISDICTION _ _ _ _ _	2
CONSTITUTIONAL PROVISIONS INVOLVED _ _ _ _ _	2
STATUTORY PROVISIONS INVOLVED _ _ _ _ _	2
STATEMENT OF THE CASE _ _ _ _ _	3
FACTS CONCERNING THE CASE _ _ _ _ _	3
STATE TRIAL AND APPELLATE COURT PROCEEDINGS _ _ _ _ _	6
SUMMARY OF ARGUMENT _ _ _ _ _	6
ARGUMENT _ _ _ _ _	8
I. THE DECISION IN <u>SOUTHERN R.R. V. DECKER</u> , STATES THAT THE SITUS OF THE TORT DETERMINES THE CIVIL RESULTS OF ITS COMMISSION AND ITS COMMISSION AND FURTHER STATED	



TABLE OF CONTENTS (CONT'D.)

	PAGES
THAT, SUITS BASED ON TORTS COMMITTED IN OTHER STATES, THE COURTS OF THIS STATE WILL ENFORCE AND BE GOVERNED BY THE "LEX LOCI DELECTI." (REASON FOR DENYING WRIT - CONFLICT WITH <u>SOUTHERN R.R. v. DECKER</u>) _ _ _ _ _	8
II. WHERE A CONFLICT OF TWO STATE'S LAWS EXIST AND A WRIT OF CERTIORARI WAS DENIED, PETITIONERS HAVE BEEN DENIED THEIR RIGHTS UNDER THE 14TH AMENDMENT OF THE U.S. CONSTITUTION. <u>CODE OF ALABAMA 1975 - § 43-8-41 ET SEQ AND § 6-5-410; CODE OF GEORGIA, 1981, O.C.G.A. § 51-4-1 and O.C.G.A. § 53-4-1 and O.C.G.A. § 53-4-30.</u> _ _ _ _ _	9
III. TRIAL COURT GRANTS MOTION FOR SUMMARY JUDGMENT IN A NEGLIGENCE COMPLAINT AND SUPREME COURT DENIES WRIT OF CERTIORARI IN CONFLICT WITH <u>WAKEFIELD V. WINTER AND ELLINGTON V. TOLAR CONSTRUCTION CO.</u> DENYING PETITIONERS REDRESS OF THEIR GRIEVANCES BEFORE A JURY AND DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION. _ _ _ _ _	12
CONCLUSION _ _ _ _ _	13



TABLE OF CONTENTS (CONTD.)

	PAGES
APPENDICES (DECISIONS BELOW) — — — — —	i
TABLE OF APPENDICES — — — — —	ii
A. GEORGIA SUPREME COURT — — — — —	iv
B. GEORGIA COURT OF APPEALS(Rehearing) — —	v
C. GEORGIA COURT OF APPEALS — — — — —	vi
D. SUPERIOR COURT OF FULTON COUNTY —	viii
E. <u>ALABAMA CODE 1975</u> § 43-8-41 — — — — —	x
F. <u>ALABAMA CODE 1975</u> § 6-5-410 — — — — —	xi
G. <u>GEORGIA CODE 1981</u> § 51-4-1 — — — — —	xii
H. <u>GEORGIA CODE 1981</u> § 53-4-1 — — — — —	xiii
I. <u>GEORGIA CODE 1981</u> § 53-4-30 — — — — —	xiv
CERTIFICATE OF SERVICE — — — — —	xv

TABLE OF AUTHORITIES

CASES	PAGE
<u>Ellington v. Tolar Corp.,</u> No 31176, Sup. Crt. of Ga. 237, Ga 235, July 9, 1976, Judgment #3, 181 (3) and #5 Negligence 136 (8) 227 S.E. 2nd 236 _____	7,12
<u>Gulf Collateral, Inc. v. Morgan,</u> 415 F. Supp. 319 (S.D. Ga.) (1976) _____	7
<u>Southern R.R. Co. v. Decker,</u> 5 Ga. app. 21, 62 S.E. 678 (1908) _____	6,8
<u>Wakefield v. Winter,</u> No. 44761, 121 Ga. Appl 259 (1970), 174 S.E. 2nd 178 Judgment #1, 181 (33) _____	7,12

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourteenth Amendment _____	2
---	---

STATUTORY PROVISIONS

<u>Code of Alabama 1975,</u> §6-5-410 (Wrongful Death) _____ §43-8-41 et seq. (Descent and Distribution) _____	2,7 2,7
<u>Code of Georgia 1981,</u> §51-4-1 (Wrongful Death) _____ §53-4-1 (Descent and Distribution) _____ §53-4-30 (Judicial determination of legal heirs and their interests) _____	2,7 2,7 2,7



TABLE OF AUTHORITIES (CONT'D.)

PAGE

United States Code, Title 28 §1257	_____ 2
---------------------------------------	---------

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GEORGE M. & FERRELL S. HORN
PETITIONERS

V.

SMITH & MERONEY, a professional
corporation, and ANNE E. MERONEY,
individually.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT AND COURT OF
APPEALS OF GEORGIA

BRIEF FOR PETITIONERS

OPINIONS BELOW

1. Order of Georgia Supreme Court appears in Appendix A.
2. Order of Court of Appeals of Georgia (rehearing) appears in Appendix B.
3. Order of Court of Appeals of Georgia appears in Appendix C.
4. Order of Superior Court of Fulton County, Georgia appears in Appendix D.



JURISDICTION

The jurisdiction of the court is based on 28 U.S.C. § 1257. The order of the Supreme Court of Georgia denying certiorari was issued on March 1, 1990 and this petition is filed within 90 days.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, which provides:

“...nor shall any State deprive any person of life, liberty, or property, without due process of law...”

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975,
§6-5-410 Wrongful Death

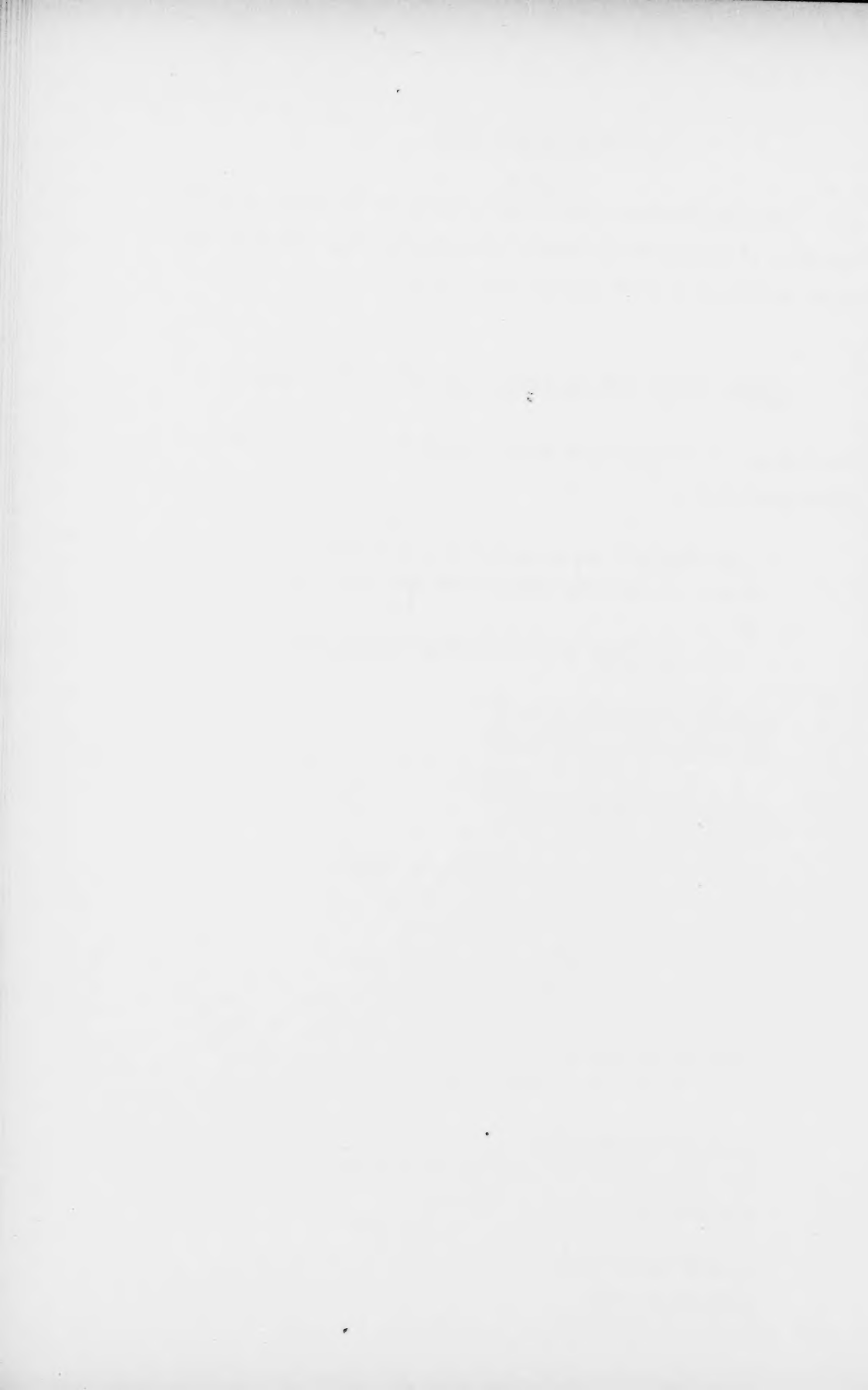
Code of Alabama 1975
§43-8-41 et seq.
Intestate Succession and
Descent & Distribution

Code of Georgia 1981
O.C.G.A. §51-4-1 (Wrongful Death)

Code of Georgia 1981
O.C.G.A. §53-4-1 (Descent and Distribution)

Code of Georgia 1981
O.C.G.A. §53-4-30 (Judicial determination of legal heirs and their interests.)

United States Code
Title 28 § 1257



STATEMENT OF THE CASE
FACTS CONCERNING THE CASE

Petitioners, George Horn and Ferrell Horn, Alabama residents, the natural living parents of William Horn and the intestate decedent, George L. Horn, resident of Georgia who met his demise through negligent homicide, July 9, 1983 in Gadsden, Alabama while riding as an invited passenger in the fatal airplane which was devoid of certain FAA required safety equipment (R 250-253).

Based on the situs of the tortious act (*lex loci delicti*) and the concept of *Comity*, Alabama Statutes control the Wrongful Death action and the Alabama Statutes of Descent and Distribution of intestate Wrongful Death proceeds. Petitioners were and are next of kin and beneficiaries under intestate decedent's estate with legal rights to share equitably with the widow. legal representative of the estate and sole heir in Georgia above the amount of \$100,000.00 recovery (R 277-279; R 483-486).

Petitioners were and are major creditors of the intestate estate for the monies financed to the decedent for pre and post graduate dental education and setting up his family dental practice, living and operation and maintenance of an automobile during his pre and post educational years. A verbal agreement existed between petitioners and the decedent that these monies were a loan and were to be paid back with interest which the decedent was honoring at the time of his death (R 251-252; R 341).

Respondents, agents for the principal, intestate decedent, accepted employment to render legal services and fulfill obligations prudently, competently and skillfully under the contract with intestator's estate where respondents' fees were paid from the intestator's estate (R 351). Petitioners notified Respondents at the incep-



tion of her employment contract of petitioners' legal rights to share separately and severally in the proceeds from Wrongful Death action and repayment of the debt of the intestate to petitioners (R 353). Pursuant to petitioners' daughter-in-law, widow and legal representative of decedent's estate, request of petitioners to sign a General Release forfeiting all petitioners legal rights under intestate estate in consideration of petitioners' furniture, placed on loan in decedent's dental office, and legal representative's refusal to acknowledge petitioner's loan, plus interest, and repayment (R 257-258; R 459); petitioners employed legal counsel in Alabama to protect petitioners' rights sharing in wrongful death proceeds. Petitioners' attorney, expert in recovering large amounts from air crash litigation action (R 258; R 344) contacted respondents in an attempt to enjoin legal representative of intestator's estate, Anne H. Horn, with petitioners, in prosecuting a wrongful death action in Alabama, situs of the tort. Respondents refused (R 434-438); entered into a contingency contract with estate representative, Anne H. Horn only; paid from proceeds of intestate's estate, filed a wrongful death action in Georgia (R 399) to collect liability insurance proceeds against only one defendant prior to paying intestator's debts to petitioners (R 439-401). Respondents dismissed the Georgia wrongful death action (R 433) with prejudice prior to the release of the final FAA report (R 288) as to cause of tort in consideration of \$100,000.00 limit of the liability insurance proceeds, blocking petitioners' claims brought in Alabama against all potential culpable defendants (R 474-475) and Anne H. Horn retained the remainder and failed to place amount recovered for conscious pain and suffering prior to death and funeral expenses of decedent into estate (R 470-471). Petitioners raised allegations of collusion and fraud in Probate Court of Fulton County, Georgia



pertaining to wrongful death settlement (R 468-469). Petitioners contend that the alleged collusion and fraud violated their rights to share and partake in the amount of the proceeds of the wrongful death claims which were settled for a paltry sum of \$100,000.00 without the petitioners consent and/or knowledge (R 492-492). Petitioners contend that there were additional funds available from other potential culpable defendants (R 489; R 445-446) to recover.

Respondents denied petitioners claim against decedent's estate to collect petitioners debt (R 383); notwithstanding the petitioners submission of certified documentation; perpetrating gross violation of petitioners' creditorship rights, resulting in personal and financial injury and damages to petitioners. Petitioners were forced to file a complaint in Cobb county State Court, Georgia (R 461-464) in order to obtain a money judgment against the intestate's estate, which the respondents defended against on behalf of the Georgia legal representative of estate, against petitioners, even though respondents' fees were paid by intestate's estate.

On June 9, 1987 petitioners filed a legal malpractice suit against the respondents for negligence in prosecuting the Wrongful Death case. Basis for the suit was under the doctrine of "lex loci delecti" which gave the laws of the State of Alabama control in Wrongful Death suits.

Respondents filed a Motion for Summary judgement which was granted by the Fulton County Superior Court in September 1988.

Petitioners filed an appeal to the Superior Court judgement on June 30, 1989.

The case was argued orally before the Court of appeals of Georgia and the trial court's summary judgement award was upheld on January 8, 1990.

A Motion for a rehearing by the petitioners was filed on January 17, 1990 and denied on January 23, 1990.

On February 9, 1990 petitioners filed a Petition of Certiorari with the Supreme Court of Georgia and it was denied on March 1, 1990.

THE STATE TRIAL AND APPELLATE COURT PROCEEDINGS

No trial was held as the respondents were granted a Motion for Summary Judgement on September 6, 1988.

An appeal was taken to the Supreme Court of Georgia on June 30, 1989 and subsequently transferred on July 7, 1989 to the Georgia Court of Appeals as being within the exclusive jurisdiction of the Court of Appeals.

Oral argument was heard on September 15, 1989 and on January 8, 1990 the Court of Appeals found "the trial court correctly granted summary of judgement in favor of respondents.

Petitioners made a Motion for Rehearing with the Georgia Court of Appeals on January 17, 1990 and it was denied on January 23, 1990.

Petitioners filed with the Supreme Court of Georgia a Petition for Certiorari on February 9, 1990 and it was denied on March 1, 1990.

SUMMARY OF ARGUMENT

I. Southern Railway Co. v. Decker, 5 Ga. App. 21, 62 S.E. 678 (1908) held that the situs of the tort determines the civil results of its commission and further stated that, "Suits based on torts com-



mitted in other States, the courts of this State will enforce and be governed by the *lex loci delecti*....” This was reaffirmed as late as 1976 in Gulf Collateral, Inc. v. Morgan, 415 F. Supp. 319 (S.D. Ga.) (1976). Based on these decisions, the Georgia Courts have denied Alabama citizens, the petitioners, their due process of law as guaranteed by the United States Constitutional Amendment #14.

II. Where the laws of the two states conflict, Alabama Code 1975, §6-5-410 (Wrongful Death) and §43-8-41 et seq (Descent and Distribution); and the Code of Georgia 1981, O.C.G.A. §51-4-1 (Wrongful Death), 53-4-1 (Descent and Distribution) and 53-4-30 (Judicial determination of legal heirs and their interests), one state cannot deny the rights of the citizens of another state by granting Summary Judgment and denying a Petition of Writ of Certiorari without taking away petitioners rights to due process of law under the 14th Amendment of the United States Constitution.

III. Petitioners allege that negligence on the part of the respondents is a question for a jury to decide and not a Motion for Summary Judgment. When the courts of Georgia granted the respondents Motion for Summary Judgment and denied a Writ of Certiorari to the petitioners, it conflicted with Wakefield v. Winter, No. 44761, 121, Ga. App. 259 (1970, 174 S.E. 2nd 178, Judgment #1, 181 (33) and Ellington v. Tolar Construction Co., No. 31176, Sup. Ct. of Ga. 237 Ga. 235, July 9, 1976, Judgment #3, 181 (33) and #5, Negligence, 136 (8), 227 S.E. 2nd 236, and denied petitioners their legal rights and due process of law.



ARGUMENT

I.

Petitioners' rights have been violated because the decision of the Georgia Court of Appeals in Southern R.R. v. Decker, 5 Ga App. 21, 62 S.E. 678 (1908) held that,

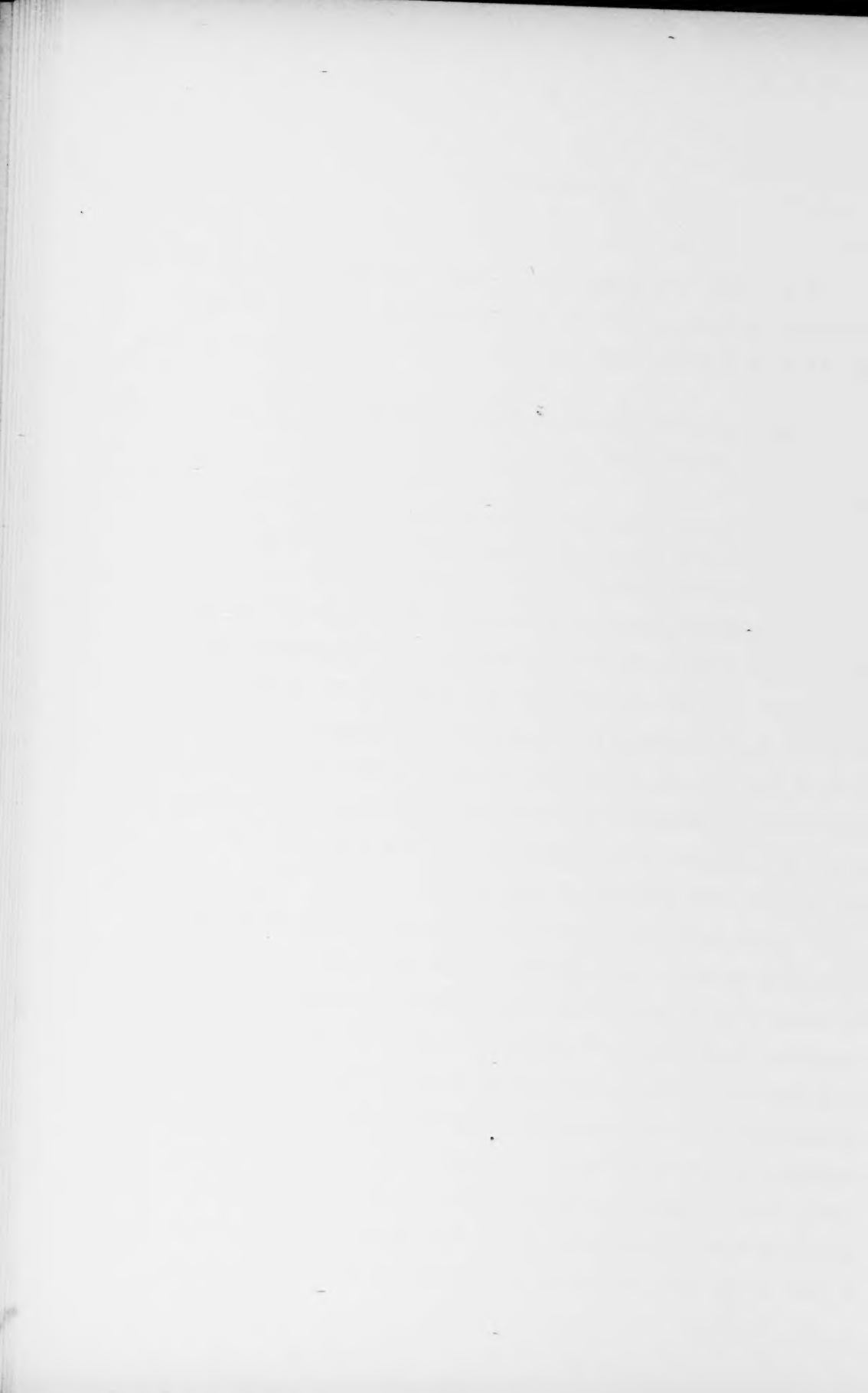
“the situs of the tort determines the civil results of its commission”

and

“suits based on tort committed in other states, the courts of this state will enforce and be governed by the ‘lex loci delecti’”.

The forgoing decision leaves no doubt that the Wrongful Death action filed by the respondents was to be governed by the statutes of the state of Alabama and therefore the statutes of Alabama, Code of Alabama 1975, § 6-5-410 (Wrongful Death) and Code of Alabama 1975, § 43-8-41 et seq (Intestate Succession and Descent and Distribution) prevail thus making the petitioners heirs at law and legatees who were injured by the negligence of the respondents, with standing to bring suit.

In the petitioners' appeal to the Court of Appeals of Georgia it was pointed out in oral argument that the petitioners never made the claim of an attorney/client relationship of a contractual nature; moreover, the petitioners/respondents relationship was based on the facts that the respondent represented Anne H. Horn, as administratrix of the intestate estate of George Lawrence Horn who met his negligent demise in Alabama. Petitioners are heirs of George L. Horn. Funds collected by the estate are collected for the use and benefit of heirs. Respondents, while representing the estate owed a duty to the heirs to collect all available funds for the estate



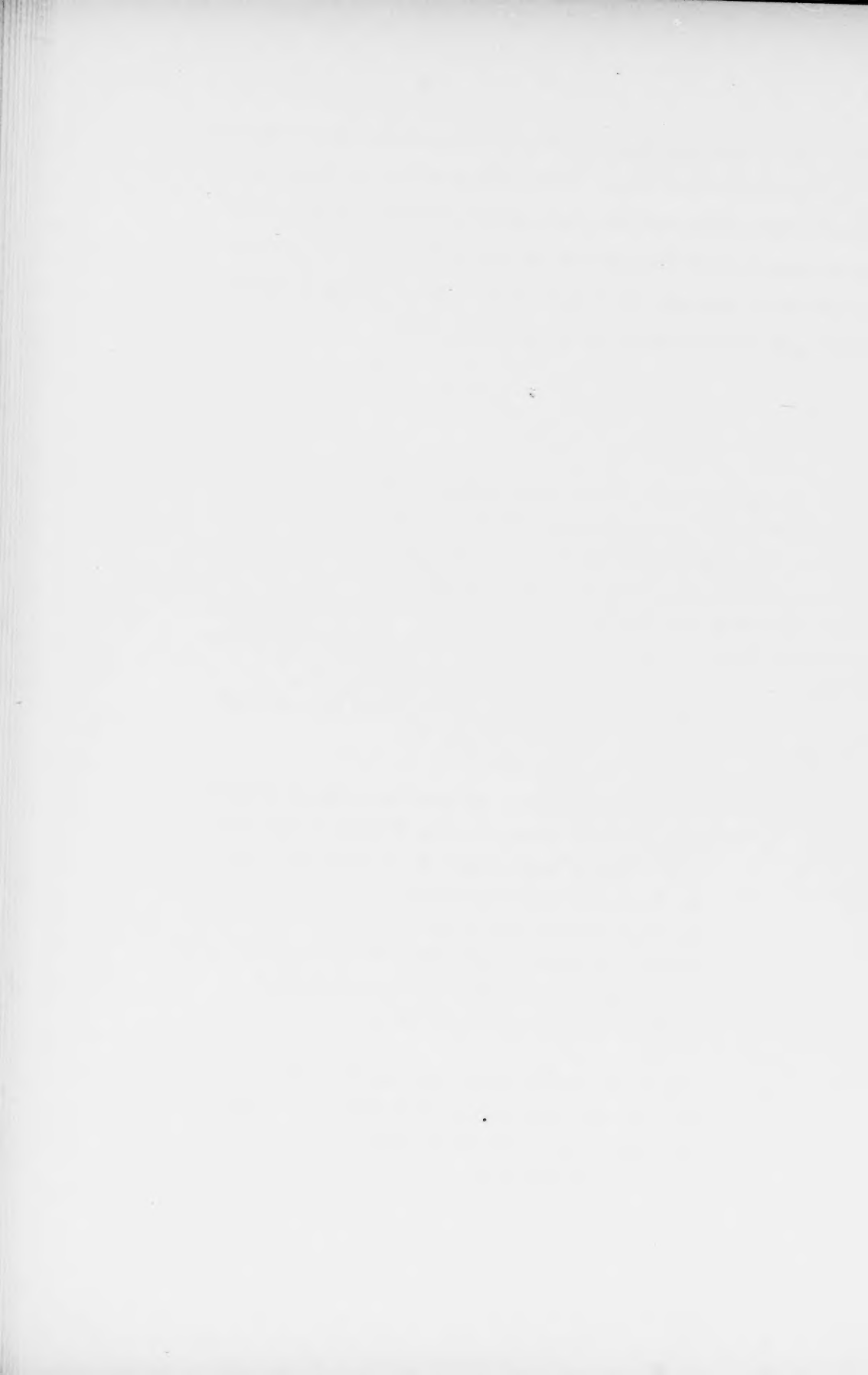
including a reasonable amount for the claim on the value of the life of George Lawrence Horn. Respondents failed in their duty to collect a reasonable amount, but instead collected a paltry sum not in keeping with the value of the life of a 31 year old dentist and the other damages allowable by law; thus injuring the petitioners and denying them due process of law.

II.

Petitioners rights have been violated because the intestacy laws governing descent and distribution in Georgia and Alabama conflict, Georgia Code 1981 O.C.G.A. §53-4-1, §51-4-1 and 53-4-30; and Alabama Code 1975, Section 43-8-41 et seq, and §6-5-410; however, the Georgia courts have ignored and/or refused to address these issues thus denying the petitioners due process of law.

The foregoing statements are based on the fact that the Georgia courts:

- a. Denied petitioners a motion for a stay of proceedings until the Fulton County Probate Court and Cobb County State Court of Georgia had ruled on the motions filed by petitioners and rendering a decision prior to pro-se petitioners having time to complete discovery after their attorney abandoned them; conflicting with Alabama, Georgia, Federal and Constitutional laws.
- b. The trial court admitted that the facts of the petitioners case were convoluted; therefore, petitioners rights could only be protected by a jury being presented all the facts and making a judgment, thus allowing justice to prevail.



- c. The Georgia courts based their decision to grant respondents motion for summary judgment, denying petitioners due process of law, on the theory of attorney/client relationship. The petitioners complaint was never based on an attorney/client relationship theory but was based on the petitioners being legal heirs, or beneficiaries pursuant to the laws of the State of Alabama and would share in the proceeds of a wrongful death verdict, pursuant to the laws of intestate succession of the State of Alabama. Therefore the respondents owed a duty of due care flowing to the legal heirs, the petitioners, during the time they were representing the administratrix of the intestate decedant's estate in the wrongful death suit. The petitioners rights have been violated by the Georgia courts, who have denied petitioners an opportunity for relief of their injuries before a jury.

- d. When the Georgia courts concluded that the respondents had not proximately caused any of petitioners alleged damages while representing the administratrix of the decedants intestate estate, it conflicted with the Alabama Statutes of Wrongful Death and Descent and Distribution. The respondents owed the petitioners a duty of due care pursuant to the laws of Alabama (situs of the tort) and Georgia in regard to the intestate estate, wrongful death, descent and distribution and judicial legal heirs. During the time they were representing the administratrix of the intestate estate, the respondents failed to collect for the full value of the decedent's life; moreover, advised the decedents's widow that it would be mete and



proper to settle the wrongful death claim for the paltry sum of One Hundred Thousand Dollars thus failing in their fiduciary duties to protect the rights of the decedent's estate and the rights of the petitioners as legal heirs.

- e. The Court of Appeals of Georgia order, Appendix C, Section 1, Paragraph 2, Page 4, states that the appellants never informed the appellees that appellants were relying upon them for legal advice is in direct conflict with the evidence presented in the appellants response to the appellees Motion for Summary Judgment. Exhibit #8, Page 353 of the Record evidences appellants personal certified letter to appellees. Exhibit 10, Page 379 of the Record evidences appellants attorney's notification to the appellees of the necessity to protect appellants legal rights in the wrongful death suit. Exhibit 29, Pages 435-439 of the Record evidences that two Georgia and two Alabama attorneys of the appellants made it clear that the appellants were relying on the appellees to protect appellants legal rights in the wrongful death suit.

As shown, there are many disputed facts that must be presented to a jury to protect petitioners legal rights and guarantee due process of law.

Appellants concur that they always understood that appellees were the legal representatives of their son's widow; however, the petitioners also understood that the representatives of the administratrix of their son's intestate estate had a duty flowing through the administratrix to all legatees, petitioners, which appellees completely disregarded and proximately caused petitioners injuries.

1

III.

Petitioners' rights were violated when the trial court of Georgia granted the respondents a motion for summary judgment when a complaint of negligence is a matter to be decided by a jury and not a matter for summary judgment.

Wakefield v. Winter No. 44761, 121 Ga. App. 259 (1970), 174 S.E. 2nd, 178, Judgment #1, 181(33).

"Issues of negligence...are ordinarily not susceptible of summary adjudication,...but must be resolved by trial court in ordinary manner."

Ellington v. Tolar Construction Co., No. 31176, Sup. Crt. of Ga. 235 Ga. 235, July 9, 1976, Judgment #3, 181 (33).

"Generally, issues of negligence...are not susceptible to summary adjudication...but should be resolved by trial in ordinary manner."

Negligence #5, 136(8).

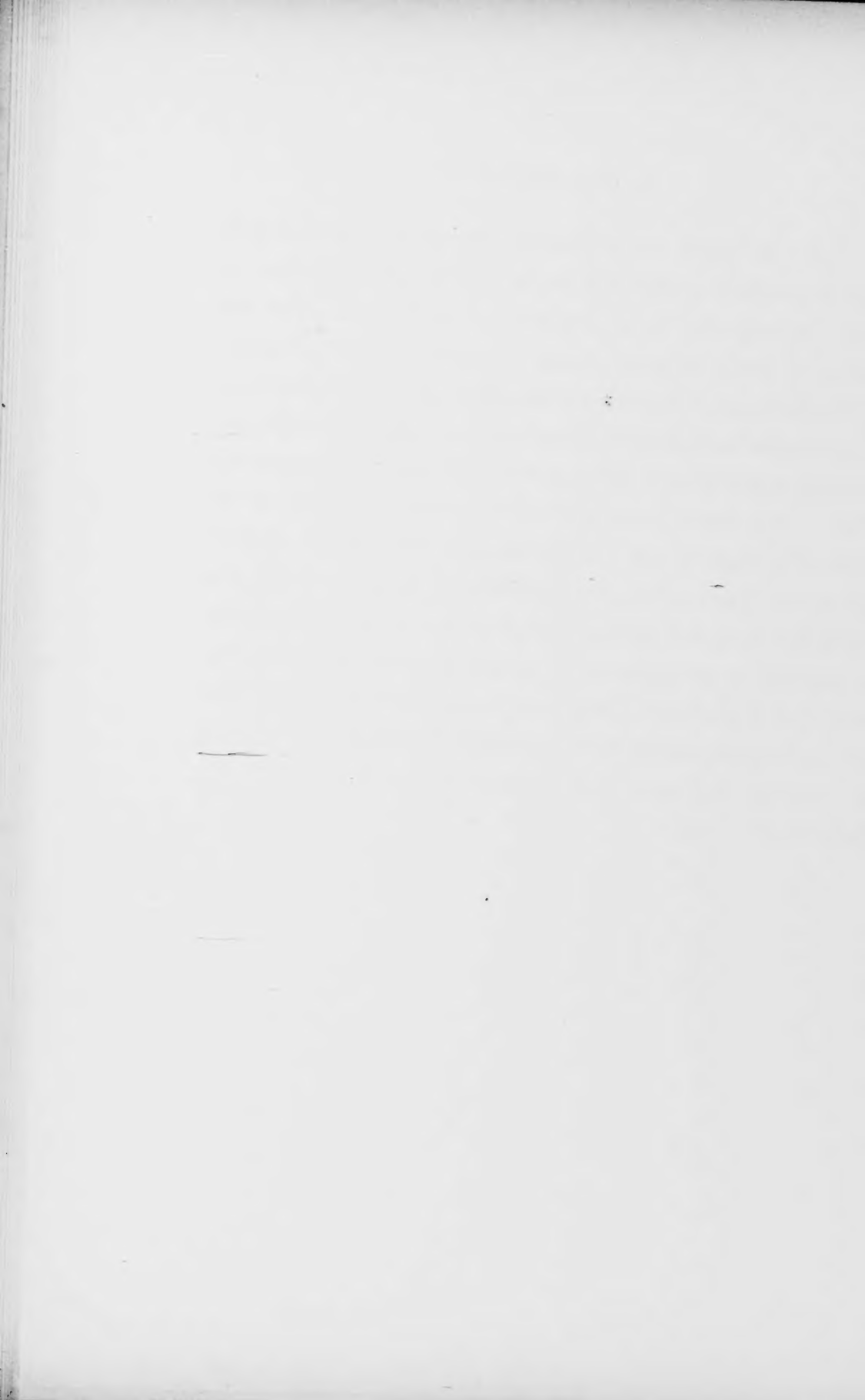
"Even when there is no dispute as to facts, it is usually for jury to say whether conduct in question meets standard of reasonable man."

The foregoing decisions leave no doubt that the Georgia courts granting a Motion for Summary Judgment and denying of a Writ of Certiorari is in conflict with State and Federal laws and inappropriate, especially when the trial court was aware that there were convoluted facts to be adjudicated before a jury, as evidenced by the Fulton County Superior Court's order dated September 6, 1988.



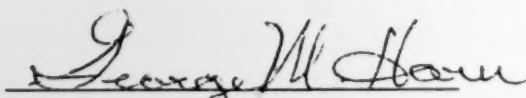
CONCLUSION

In conclusion, the petitioners, George M. and Ferrell S. Horn, respectfully submit that the decision to grant a Motion for Summary Judgment to the respondents by the trial court and subsequent denial of appeal, denial of a motion for a rehearing by the Georgia court of Appeals and the denial of a Writ of Certiorari by the Georgia Supreme Court deprived the petitioners of their constitutional rights of due process of law under the 14th Amendment of the United States Constitution. The failure, or refusal, by the courts of Georgia to consider the issue of the conflicts of laws between the states of Georgia and Alabama and the granting of a Motion for Summary Judgment when at issue is the negligence of the respondents are issues which should be settled by a jury. The granting of a Motion for Summary Judgment is in conflict with Georgia laws; and the failure by the courts of Georgia to recognize the Doctrine of Comity and the issue of "lex loci delecti" are travesties of justice.



For these reasons, the petitioners pray that this Honorable Court will issue a Writ of Certiorari and review decisions and opinions of the Superior Court of Fulton County, the Court of appeals of the State of Georgia and the Supreme Court of Georgia; and upon such review will reverse the decision of the courts in Georgia and grant a Writ of Certiorari.

Respectfully submitted,

A handwritten signature in cursive script, reading "George M. Horn", written over a horizontal line.

George. M. Horn, Pro Se

A handwritten signature in cursive script, reading "Ferrell S. Horn", written over a horizontal line.

Ferrell S. Horn, Pro Se

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GEORGE M. AND FERRELL S. HORN
PETITIONERS

V.

SMITH & MERONEY, a professional
corporation, and ANNE E. MERONEY,
individually,

RESPONDENTS

APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT AND COURT OF
APPEALS OF GEORGIA

GEORGE M. HORN, PRO SE

AND

FERRELL S. HORN, PRO SE

COUNSEL OF RECORD

308 Brookside Dr.
Auburn, AL 36830
(205) 821-3616

TABLE OF APPENDICES

	PAGE
APPENDIX A - ORDER OF SUPREME COURT OF GEORGIA DATED MARCH 1, 1990. — — — — —	1
APPENDIX B - ORDER OF GEORGIA COURT OF APPEALS (REHEARING) DATED JANUARY 23, 1990. — — —	2
APPENDIX C - ORDER OF GEORGIA COURT OF APPEALS, DATED JANUARY 8, 1990. — — — — —	3
APPENDIX D - ORDER OF SUPERIOR COURT OF FULTON COUNTY, GA. DATED SEPTEMBER 6, 1988 — — —	5
APPENDIX E - <u>ALABAMA CODE 1975 - § 43-8-41</u> et seq Intestacy succession and descent and distribution — — — — —	7
APPENDIX F - <u>ALABAMA CODE 1975 - § 6-5-410</u> Wrongful act, ommissions or negligence causing death a personal representative may commence an action and recover such damages as the jury may access in a court of competent jurisdiction within the State of Alabama and <u>not elsewhere</u> for the wrongful act omission or negligence of any person, persons or corporation, his or their servants or agents whereby the death of the testators or intestator was caused, provided the testator or the intestator	

TABLE OF APPENDICES (CONT'D.)

PAGE

could have commenced the action
for such wrongful act, omission or
negligence if it had not
caused death. — — — — — 8

APPENDIX G - GEORGIA CODE 1981 § 51-4-1
(105-1308) Wrongful death - full
value of life of the decedent as
shown by the evidence defined. — 9

APPENDIX H - GEORGIA CODE 1981 § 53-4-1
(113-1001). Rules of distribution -
after the payment of the expenses of
administration and the debts of
the decedent, the balance of the
estate both real and personal, shall
stand subject to distribution among
the heirs at law of the decedent,
according to the rules prescribed
by law. — — — — — 10

APPENDIX I - GEORGIA CODE 1981 § 53-4-30
(113-2801). Judicial determination
of legal heirs and their interests. — 11



APPENDIX A

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: MARCH 1, 1990

GEORGE M. HORN
308 BROOKSIDE DRIVE
AUBURN, AL 36830

Case No. S90C0628

GEORGE HORN ET AL. V. SMITH AND MERONEY, P.C.,
ET AL

COURT OF APPEALS CASE NO. A89A1923

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA

JANUARY 23, 1990

The Honorable Court of Appeals met pursuant to adjournment.
The following order was passed:

A89A1923. GEORGE HORN ET AL v. SMITH AND MER-
ONEY, P.C. ET AL

Upon consideration of the motion for a rehearing filed in this
case, it is ordered that it be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA
JANUARY 23, 1990

I certify that the above is a true extract from the minutes
of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto
affixed the day and year last above written.

VICTORIA MCLAUGHLIN
CLERK

APPENDIX C

Jan. 8, 1990

CARLEY, C.J.

McMURRAY, P.J., & BEASLEY, J.

In the Court of Appeals of Georgia

A89A1923. HORN et al. v. SMITH AND MERONEY, P.C. et al.

CARLEY, Chief Judge.

When Mr. George Horn died in an airplane crash, he was survived by his wife and by appellant-plaintiffs, his parents. His wife secured the legal services of appellee-defendants to bring a wrongful death action. After the wrongful death claim was settled, appellants filed this legal malpractice action against appellees, alleging a deviation from the applicable standard of care in pursuing the wrongful death claim. Appellees answered and subsequently moved for summary judgment. The trial court granted appellees' motion and appellants appeal.

1. "“It is generally held that an attorney-client relationship must be demonstrated before a plaintiff may recover in a legal malpractice suit This is essential in establishing the element of duty that is necessary to every lawsuit based upon a theory of negligence” Accordingly, the threshold question in the case sub judice is whether or not there was an attorney-client relationship between the appellants and [appellees]. [Cit.]” Moore v. Harris, 188 Ba. App. 251, 252 (372 SE2d 654) (1988).

“The relationship of attorney-client may be expressly created by written contract, or may be inferred from the conduct of the parties. [Cit.] Although ‘[g]enerally, the test of employment is the fee,’ [cits.], the basic question in regard to the formation of the attorney-client relationship is whether it has been sufficiently established that advice or assistance of the attorney is both sought and received in matters pertinent to his profession. [Cit.] “Huddleston v. State, 259 Ga. 45, 46-47 (1) (376 SE2d 683) (1989). In



their depositions, appellants acknowledged that they never paid any legal fees to appellees and never sought any legal advice from them. Likewise, appellants never informed appellees that they were relying upon them for legal advice, and they admit that they have always understood that appellees were the legal representatives of their son's widow. Except for one brief period of time, appellants have been represented by counsel of their own choosing in connection with their legal rights as surviving parents of their deceased son. This, "[t]he evidence demanded a finding that no attorney-client relationship existed, ... in the classic sense of the term. [Cit.] Moore v. Harris, supra at 252-253. It follows that the trial court correctly granted summary judgment in favor of appellees.

2. Appellants remaining enumerations of error have been considered and found to be either moot or without merit.

Judgment affirmed. McMurray, P.J., and Beasley, J.,
concur.

APPENDIX D

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGE HORN, et al.,
Plaintiffs

vs.

SMITH & MERONEY, P.C., a
professional corporation, et al.,

Defendants

ORDER ON MOTIONS

1. Plaintiffs' motion for stay of proceedings. Plaintiffs' motion for stay of proceedings, filed July 18, 1988, is denied.

2. Defendants' motion for summary judgment. This court has concluded that there are no genuine issues of material fact and that defendants are entitled to judgment as a matter of law.

The plaintiffs are pro se. While the facts of this case are somewhat convoluted, the evidence shows that defendants were retained to represent the plaintiffs' daughter-in-law in connection with certain legal matters growing out of the death of the plaintiffs' son. The plaintiffs have filed this action alleging legal malpractice. However, the evidence fails to support plaintiffs' claims.

It is clear from the record that no attorney-client relationship ever existed between the plaintiffs and the defendants. Additionally, it is clear from the record that the defendants acted with the requisite degree of care, skill and diligence in their representation of plaintiffs' daughter-in-law. Also, from the record this court has concluded that no act or omission by the defendants proximately caused any of plaintiffs' alleged damages.

For the foregoing reasons, defendants' motion for summary judgment is granted.

This 6th day of September, 1988.

William H. Alexander
Judge

APPENDIX E

ALABAMA CODE - §43-8-41 et seq

Intestacy succession and descent and distribution.



APPENDIX FALABAMA CODE - § 6-5-410

Wrongful act, omissions or negligence causing death a personal representative may commence an action and recover such damages as the jury may access in a court of competent jurisdiction within the State of Alabama and not elsewhere for the wrongful act omission or negligence of any person, persons or corporation, his or their servants or agents whereby the death of the testators or intestator was caused, provided the testator or the intestator could have commenced the action for such wrongful act, omission or negligence if it had not caused death.

APPENDIX G

GEORGIA CODE 1981 § 51-4-1 (105-1308)

Wrongful death - full value of life of the decedent as shown by the evidence defined.

APPENDIX H

GEORGIA CODE 1981 § 53-4-1

Rules of distribution - after the payment of the expenses of administration and the debts of the decedent, the balance of the estate both real and personal, shall stand subject to distribution among the heirs at law of the decedent, according to the rules prescribed by law. -



APPENDIX I

GEORGIA CODE 1981. § 53-4-30

Judicial determination of legal heirs and their interests.



CERTIFICATE OF SERVICE

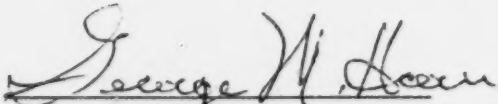
We, George M. Horn and Ferrell S. Horn, hereby certify that three true and corrected copies of the foregoing PETITION FOR WRIT OF CERTIORARI and APPENDIX TO THE PETITION FOR WRIT OF CERTIORAR have been served on:

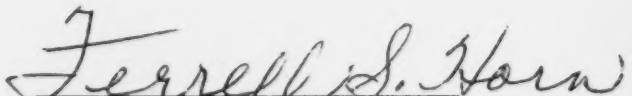
Karen B. Bragman
ARNALL, GOLDEN & GREGORY
55 Park Place, Fourth Floor
Atlanta, GA 30335

by depositing the same in the United States mail in a properly addressed envelope with sufficient postage.

This 15th day of June 1990.

Respectfully submitted


George M. Horn, Pro Se


Ferrell S. Horn, Pro Se

308 Brookside Drive
Auburn, AL 36830
(205) 821-3616

89-1850

Supreme Court, U.S.
FILED

MAY 29 1990

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GEORGE M. AND FERRELL S. HORN
PETITIONERS

V.

SMITH & MERONEY, P.C.
RESPONDENT

APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT AND COURT OF
APPEALS OF GEORGIA

GEORGE M. HORN, PRO SE

AND

FERRELL S. HORN, PRO SE

COUNSEL OF RECORD

308 Brookside Dr.
Auburn, AL 36830
(205) 821-3616

TABLE OF APPENDIXES

PAGE

APPENDIX A -	ORDER OF SUPREME COURT OF GEORGIA DATED MARCH 1, 1990. — — — — — 1
APPENDIX B -	ORDER OF GEORGIA COURT OF APPEALS (REHEARING) DATED JANUARY 23, 1990. — — 2
APPENDIX C -	ORDER OF GEORGIA COURT OF APPEALS, DATED JANUARY 8, 1990. — — — — — 3
APPENDIX D -	ORDER OF SUPERIOR COURT OF FULTON COUNTY, GA. DATED SEPTEMBER 6, 1988 — — 5
APPENDIX E -	<u>ALABAMA CODE - § 43-8-41</u> et seq Intestacy succession and descent and distribution — — — — 7
APPENDIX F -	<u>ALABAMA CODE - § 6-5-410</u> Wrongful act, omissions or negligence causing death (A) a personal representative may commence an action and recover such damages as the jury may access in a court of competent jurisdiction within the State of Alabama and not elsewhere for the wrongful act omission or negligence of any person, persons or corporation, his or their servants or agents whereby the death of the testators or intestator was caused, provided the testator or the intestator

TABLE OF APPENDIXES (CONT'D.)

PAGE

could have commenced the action
for such wrongful act, omission or
negligence if it had not
caused death. — — — — — 8

APPENDIX G - GEORGIA CODE 1981 § 51-4-2
(105-1308) Wrongful death - full
value of life of the decedent as
shown by the evidence defined. — 9

APPENDIX H - GEORGIA CODE 1981 § 53-4-1
Rules of distribution - after the
payment of the expenses of
administration and the debts of
the decedent, the balance of the
estate both real and personal, shall
stand subject to distribution among
the heirs at law of the decedent,
according to the rules prescribed
by law. — — — — — 10

CERTIFICATE OF SERVICE — — — — — 11

APPENDIX A

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: MARCH 1, 1990

GEORGE M. HORN
308 BROOKSIDE DRIVE
AUBURN, AL 36830

Case No. S90C0628

GEORGE HORN ET AL. V. SMITH AND MERONEY, P.C.,
ET AL

COURT OF APPEALS CASE NO. A89A1923

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

APPENDIX BCOURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA

JANUARY 23, 1990

The Honorable Court of Appeals met pursuant to adjournment.
The following order was passed:

A89A1923. GEORGE HORN ET AL v. SMITH AND MER-
ONEY, P.C. ET AL

Upon consideration of the motion for a rehearing filed in this
case, it is ordered that it be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA
JANUARY 23, 1990

I certify that the above is a true extract from the minutes
of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto
affixed the day and year last above written.

VICTORIA MCLAUGHLIN
CLERK

APPENDIX C

CARLEY, C.J.
McMURRAY, P.J., & BEASLEY, J.

In the Court of Appeals of Georgia

A89A1923. HORN et al. v. SMITH AND MERONEY, P.C. et al.

CARLEY, Chief Judge.

When Mr. George Horn died in an airplane crash, he was survived by his wife and by appellant-plaintiffs, his parents. His wife secured the legal services of appellee-defendants to bring a wrongful death action. After the wrongful death claim was settled, appellants filed this legal malpractice action against appellees, alleging a deviation from the applicable standard of care in pursuing the wrongful death claim. Appellees answered and subsequently moved for summary judgment. The trial court granted appellees' motion and appellants appeal.

1. ““It is generally held that an attorney-client relationship must be demonstrated before a plaintiff may recover in a legal malpractice suit This is essential in establishing the element of duty that is necessary to every lawsuit based upon a theory of negligence” Accordingly, the threshold question in the case sub judice is whether or not there was an attorney-client relationship’ between the appellants and [appellees]. [Cit.]” Moore v. Harris, 188 Ga. App. 251, 252 (372 SE2d 654) (1988).

“The relationship of attorney-client may be expressly created by written contract, or may be inferred from the conduct of the parties. [Cit.] Although ‘[g]enerally, the test of employment is the fee,’ [cits.], the basic question in regard to the formation of the attorney-client relationship is whether it has been sufficiently established that advice or assistance of the attorney is both sought and received in matters pertinent to his profession. [Cit.] “Huddleston v. State, 259 Ga. 45, 46-47 (1) (376 SE2d 683) (1989). In

their depositions, appellants acknowledged that they never paid any legal fees to appellees and never sought any legal advice from them. Likewise, appellants never informed appellees that they were relying upon them for legal advice, and they admit that they have always understood that appellees were the legal representatives of their son's widow. Except for one brief period of time, appellants have been represented by counsel of their own choosing in connection with their legal rights as surviving parents of their deceased son. This, "[t]he evidence demanded a finding that no attorney-client relationship existed, ... in the classic sense of the term. [Cit.] Moore v. Harris, supra at 252-253. It follows that the trial court correctly granted summary judgment in favor of appellees.

2. Appellants remaining enumerations of error have been considered and found to be either moot or without merit.

Judgment affirmed. McMurray, P.J., and Beasley, J.,
concur.

APPENDIX DIN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIAGEORGE HORN, et al.,
Plaintiffs

vs.

SMITH & MERONEY, P.C., a
professional corporation, et al.,

Defendants

ORDER ON MOTIONS

1. Plaintiffs' motion for stay of proceedings. Plaintiffs' motion for stay of proceedings, filed July 18, 1988, is denied.

2. Defendants' motion for summary judgment. This court has concluded that there are no genuine issues of material fact and that defendants are entitled to judgment as a matter of law.

The plaintiffs are pro se. While the facts of this case are somewhat convoluted, the evidence shows that defendants were retained to represent the plaintiffs' daughter-in-law in connection with certain legal matters growing out of the death of the plaintiffs' son. The plaintiffs have filed this action alleging legal malpractice. However, the evidence fails to support plaintiffs' claims.

It is clear from the record that no attorney-client relationship ever existed between the plaintiffs and the defendants. Additionally, it is clear from the record that the defendants acted with the requisite degree of care, skill and diligence in their representation of plaintiffs' daughter-in-law. Also, from the record this court has concluded that no act or omission by the defendants proximately

For the foregoing reasons, defendants' motion for summary judgment is granted.

This 6th day of September, 1988.

William H. Alexander
Judge

APPENDIX E

ALABAMA CODE - §43-8-41 et seq

Intestacy succession and descent and distribution.

APPENDIX FALABAMA CODE - § 6-5-410

Wrongful act, omissions or negligence causing death (A) a personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama and not elsewhere for the wrongful act omission or negligence of any person, persons or corporation, his or their servants or agents whereby the death of the testator or intestator was caused, provided the testator or the intestator could have commenced the action for such wrongful act, omission or negligence if it had not caused death.

APPENDIX GGEORGIA CODE 1981 § 51-4-2 (105-1308)

Wrongful death - full value of life of the decedent as shown by the evidence defined.

APPENDIX HGEORGIA CODE 1981 § 53-4-1

Rules of distribution - after the payment of the expenses of administration and the debts of the decedent, the balance of the estate both real and personal, shall stand subject to distribution among the heirs at law of the decedent, according to the rules prescribed by law.

CERTIFICATE OF SERVICE

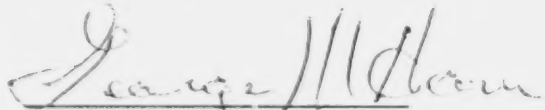
We, George M. Horn and Ferrell S. Horn, hereby certify that three true and correct copies of the foregoing APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI has been served on:

Karen B. Bragman
ARNALL, GOLDEN & GREGORY
55 Park Place, Fourth Floor
Atlanta, GA 30335

by depositing the same in the United States mail in a properly addressed envelope with sufficient postage.

This 26th day of May 1990.

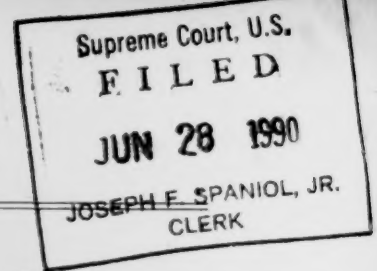
Respectfully submitted


George M. Horn, Pro Se


Ferrell S. Horn, Pro Se

308 Brookside Drive
Auburn, AL 36830
(205) 821-3616

4
No. 89-1850



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE M. HORN and
FERRELL S. HORN,

Petitioners,

v.

SMITH & MERONEY, a Professional
Corporation, and
ANNE E. MERONEY, Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

KAREN BARRIS BRAGMAN
(Counsel of Record)

ARNALL GOLDEN &
GREGORY
55 Park Place
Suite 400
Atlanta, Georgia 30335
(404) 577-5100

June 28, 1990

Attorney for Respondents

Lex Publishing Company, 2161 Monroe Dr., Atlanta, Georgia 30324 (404) 875-5140

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	5
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases	Page
<i>Ehlers v. Schwall & Heuett</i> , 177 Ga. App. 548, 340 S.E.2d 207 (1986)	6
<i>Guillebeau v. Jenkins</i> , 182 Ga. App. 225, 355 S.E.2d 453 (1987)	7, 8
<i>Howard v. Walker</i> , 242 Ga. 406, 249 S.E.2d 45 (1978)	6
<i>Hughes v. Malone</i> , 146 Ga. App. 341, 247 S.E.2d 107 (1978)	6
<i>Johnson v. Butcher</i> , 165 Ga. App. 469, 301 S.E.2d 665 (1983)	6
<i>Mims v. Wardlaw</i> , 176 Ga. App. 891, 338 S.E.2d 866 (1985)	6
<i>Moore v. Harris</i> , 188 Ga. App. 251, 372 S.E.2d 654 (1988)	7, 8
<i>Rice v. Sioux City Memorial Park Cemetery, Inc.</i> , 349 U.S. 70 (1955).....	5
Statutes	
O.C.G.A. § 9-11-9.1.....	7
Rules	
Rule 10 of the Rules of the Supreme Court of the United States.....	4, 5
Publications	
Harlan, <i>Manning the Dikes</i> , 13 Rec. A.B. City N.Y. 541 (1958)	5

No. 89-1850

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE M. HORN and
FERRELL S. HORN,

Petitioners,

v.

SMITH & MERONEY, a Professional
Corporation, and

ANNE E. MERONEY, Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On January 8, 1990, the Court of Appeals of Georgia affirmed a Superior Court of Fulton County, Georgia Order granting Respondents a summary judgment on Petitioners' claim for legal malpractice. Petitioners now seek a writ of certiorari from this Court to review the adverse judgment entered against them, which judgment was unanimously affirmed at all appellate levels within the Georgia court system.

In October, 1983, Anne Halstead Horn, the widow of George Lawrence Horn ("the decedent") and the administratrix of his estate, contacted Anne E. Meroney of the law firm of Smith & Meroney, P.C., and asked Ms. Meroney to file a wrongful death action seeking damages for the decedent's death. Ms. Meroney was informed that the decedent had been killed in an airplane crash on July 9, 1983. The crash occurred while Henry Reeves Claxton and the decedent were participating in an air show and while Mr. Claxton was flying the plane. (R. at 176, 187-88).

After she was retained by Anne Horn, Ms. Meroney conducted a thorough investigation of the wrongful death case. Based on the Georgia residence of the defendant and the locale of the estates of Henry Reeves Claxton and the decedent, Ms. Meroney determined that the wrongful death action could be brought in Georgia. Since the decedent and Anne Horn had no children, Anne Horn was the proper party plaintiff to a wrongful death action. (R. at 177, 188).

Petitioners never asked Ms. Meroney or her firm to perform any legal services for them. (R. at 190-91, 206-09, 214-18). Indeed, the Respondents had no contact with the Petitioners at any time relevant to this lawsuit. (R. at 181-83, 200-04, 213-14). Instead, the Horns retained James J. Thompson, Jr., of Birmingham, Alabama, and others as their attorneys. (R. at 180-81, 204, 214-15). Because the Petitioners' interests were adverse to those of Ms. Meroney's client, Anne Horn, they consistently had independent representation. (R. 183-84, 191).

The Petitioners also filed various adversary proceedings against Anne Horn. (R. at 183-84, 191). In all

such cases, the Respondents represented Anne Horn and the Petitioners' interests were represented by other attorneys. (R. at 191).

Petitioners filed this action alleging legal malpractice by the Respondents. Petitioners' complaint raised no questions of federal law; it alleged only that Respondents, in their representation of Anne Horn, had somehow breached a duty to Petitioners and caused them damage.

Moreover, Petitioners never filed an expert's affidavit supporting their assertion of malpractice. However, Respondents filed two experts' affidavits in support of their motion for summary judgment. There was, therefore, no record evidence supporting Petitioners' contention that Respondents' services on behalf of their client fell below the standard of care.

On Respondents' motion for summary judgment, the Superior Court of Fulton County, Georgia found for Respondents. The court ruled that, as a matter of law, no attorney-client relationship existed between the Respondents and the Petitioners. (Court's September 6, 1988 Order; R. at 558-59). The Court also found that the Respondents acted with the requisite degree of care, skill and diligence in their representation of the Petitioners' daughter-in-law and that no act or omission by the Respondents proximately caused any of the Petitioners' alleged damages. Accordingly, the court entered summary judgment in favor of Respondents.

SUMMARY OF ARGUMENT

Petitioners seek review of the Georgia appellate courts' refusal to reverse the trial court's entry of summary judgment in favor of Respondents in this legal malpractice case. Petitioners have failed to demonstrate that any of the considerations for certiorari, as outlined in Rule 10 of this Court's Rules, is applicable.

No issues of federal law are present in this case. Additionally, Petitioners have failed to show any special or important reasons that would justify review by this Court. The issues are limited to this particular factual setting and will not have continuing future consequences.

Finally, even if this case did present proper issues for review by this Court, it is clear that the trial court properly entered summary judgment in favor of Respondents. In legal malpractice cases, Georgia law requires the presentation of expert testimony on whether particular conduct satisfies the applicable standard of care. Petitioners failed to submit any such testimony. Petitioners also failed to present any genuine issue of material fact as to whether an attorney-client relationship existed between themselves and Respondents or whether any conduct by Respondents proximately caused their alleged damages.

There is no basis in law or fact for Petitioners' claims. Accordingly, the Petition for Writ of Certiorari should be denied.

ARGUMENT

The Petitioners contend that they have been denied due process of law by the refusal of the appellate courts of Georgia to reverse the trial court's entry of summary judgment in favor of Respondents. What Petitioners actually seek is to have this Court review the record to determine whether the lower courts properly found that Petitioners had failed to present a genuine issue of fact as to any of the three elements of their legal malpractice claim.

Rule 10.1 of the Rules of this Court outlines the considerations governing the review on certiorari to a state court of last resort. When the standards of Rule 10 are applied to the instant case, it is clear that none of the considerations providing a basis for a grant of certiorari is present.

First, none of the considerations dealing with the review of decisions on federal law is applicable. This case involved a claim for legal malpractice brought under Georgia law. Neither the state trial court nor the Georgia appellate courts decided a federal question.

Second, there are no special and important reasons for granting certiorari. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Issues that arise within the framework of a unique factual setting and are not likely to have "continuing future consequences" are not generally issues that should be reviewed on certiorari. Harlan, *Manning the Dikes*, 13 Rec. A.B. City N.Y. 541, 552 (1958).

Here, Petitioners request that this Court review the pleadings and discovery in their case and decide whether, in light of the facts presented, the trial court correctly found that no genuine issue of material fact was presented on the questions of: (1) the non-existence of an attorney-client relationship; (2) Respondents' fulfillment of the duty of care; and (3) lack of proximate cause. These issues, which are clearly limited to a specific factual setting, will not have "continuing future consequences." Instead, they are exactly the type of "narrow" or "episodic" issues that should not be reviewed on certiorari.

Even assuming *arguendo* that there were some basis to go beyond the threshold question of whether this case presents a compelling reason for review, there was ample justification for the entry of summary judgment and the Court of Appeals' affirmance thereof. Under Georgia law, in the absence of expert testimony, it is presumed that legal services have been performed in an ordinarily skillful manner. *Ehlers v. Schwall & Heuett*, 177 Ga. App. 548, 340 S.E.2d 207 (1986); *Hughes v. Malone*, 146 Ga. App. 341, 247 S.E.2d 107 (1978). To prove a legal malpractice action, it is, therefore, essential that competent expert evidence be presented as to the nonacceptability of particular conduct. In cases where this presumption is not properly rebutted, summary judgment in favor of the attorney is proper. *E.g.*, *Mims v. Wardlaw*, 176 Ga. App. 891, 338 S.E.2d 866 (1985); *Johnson v. Butcher*, 165 Ga. App. 469, 301 S.E.2d 665 (1983); *Howard v. Walker*, 242 Ga. 406, 249 S.E.2d 45 (1978).

Georgia's commitment to requiring expert testimony in malpractice cases is also reflected by legislative

enactment. O.C.G.A. § 9-11-9.1. That statute, which became effective on July 1, 1987, just weeks after Petitioners filed their complaint, codifies the above-cited case law and requires plaintiffs in professional malpractice cases to submit an affidavit by an expert setting forth at least one act of malpractice along with the complaint.

Petitioners never submitted expert testimony to support their allegations of legal malpractice. Based on the Petitioners' failure to support their allegations of legal malpractice by way of an expert's affidavit, as is required by Georgia law, summary judgment was appropriately entered in favor of the Respondents. For this Court to disturb the Georgia courts' rulings would require invalidation of O.C.G.A. § 9-11-9.1 and reversal of a long line of established Georgia case law.

While the Georgia Court of Appeals relied exclusively on the absence of an attorney-client relationship between the parties in affirming the trial court's order, it is clear that the trial court's grant of Respondents' motion for summary judgment was also based on Petitioners' failure to submit expert testimony in support of their claim. This question is firmly settled in Georgia law and does not merit review by this Court.

Further, Petitioners failed to establish a material issue of fact as to the non-existence of an attorney-client relationship. The existence of such a relationship is essential to establish the requisite duty in a legal malpractice action. *Moore v. Harris*, 188 Ga. App. 251, 252, 372 S.E.2d 654 (1988); *Guillebeau v. Jenkins*, 182 Ga. App. 225, 355 S.E.2d 453 (1987).

There was simply no evidence before the trial court from which an attorney-client relationship could be found. On the facts of this case, summary judgment and the affirmance of that judgment were appropriate because there was no attorney-client relationship between Respondents and Petitioners. See *Moore*, 188 Ga. App. at 252, 372 S.E.2d at 655; *Guillebeau*, 182 Ga. App. at 229, 355 S.E.2d at 457. A review of this case on certiorari would require the Court to engage in a review of the factual record. That task was carefully done by the lower courts and does not warrant the attention of this Court.

The choice of law and deprivation of due process questions presented by Petitioners are without merit. The choice of law on the underlying wrongful death action was irrelevant to the questions of whether, as an initial matter, an attorney-client relationship existed between Respondents and Petitioners and whether Petitioners created an issue as to Respondents' satisfaction of the applicable standard of care. Moreover, all expert testimony in the record stated that Georgia law, and not Alabama law, applied. Finally, the Petitioners were not deprived of due process of law by the lower courts' rulings on the questions of whether an attorney-client relationship existed between the parties and whether Petitioners' complaint was adequately supported by competent expert testimony.

In short, the circumstances of this case do not justify the issuance of a Writ of Certiorari. Moreover, it is clear that the trial court acted correctly, and that its Order was properly affirmed by the Georgia Court of Appeals.

CONCLUSION

The essential substantive questions in this lawsuit are questions of Georgia law that are so well settled that the Supreme Court of Georgia declined to hear the case. The case raises no issues of federal law and is limited to a specific factual setting. As such, it does not present any special or important reason for review on certiorari. In any event, the Superior Court of Fulton County, Georgia, ruled correctly and in accordance with the applicable law.

The Petitioners' claims of constitutional deprivation are meritless. Respondents request that this Court deny the instant petition for writ of certiorari to the Supreme Court of Georgia.

Respectfully submitted,

KAREN BARRIS BRAGMAN
(Counsel of Record)

ARNALL GOLDEN &
GREGORY

55 Park Place
Suite 400
Atlanta, Georgia 30335
(404) 577-5100

Attorney for Respondents

June 28, 1990

(5)
No. 89-1850

Supreme Court, U.S.
FILED

JUN 26 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GEORGE M. & FERRELL S. HORN

PETITIONERS

v.

SMITH & MERONEY, a Professional
Corporation, and ANNE E. MERONEY
Individually

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT AND COURT OF
APPEALS OF GEORGIA

REPLY BRIEF

GEORGE M. HORN, PRO SE
AND

FERRELL S. HORN, PRO SE

COUNSEL OF RECORD
308 Brookside Dr.
Auburn, AL 36830
(205) 821-3616

BEST AVAILABLE COPY



TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities Cited	ii iii
I. REPLY BRIEF FOR PETITION	
FOR WRIT OF CERTIORARI	1-7
A. ARGUMENT	7-13
B. CONCLUSION	13-15
II. AFFIDAVITS	16-17
III. CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Ellington v. Tolar Construction Co.</u>	
237 Ga. 235, 227 S.E. 2d 336 (1976)	13
<u>Gulf Collateral Inc. v. Morgan</u>	
415 F Supp 319 (1976)	12
<u>Knight v. Wingate</u>	
205 Ga 133, 52 S.E. 2d 604	9
(1949)	
<u>Pearson v. Northeast Airlines, Inc.</u>	
U.S. Ct of App, 2d Ct. November 8, 1962; 309 F 2d 553, 92 ALR 2d 1162	8
<u>Southern R.R. Co. v. Decker</u>	
5 Ga App 21, 62 SE 678 (1908)	12
<u>Wakefield v. A.R. Winter Co.</u>	
121 Ga. App 259, 174 SE 2d 178 (1970)	13

CONSTITUTIONAL PROVISIONS

<u>United States Constitution</u>	
Fourteenth Amendment	7

STATUTES

<u>Code of Alabama 1975</u>	
Section 6-5-410 (Wrongful Death)	
Section 43-8-41 et seq (Descent and Distribution)	8

TABLE OF AUTHORITIES (Cont.)

STATUTES

PAGE

Code of Georgia 1981

Section 51-4-1 (Wrongful Death)	
Section 53-4-1 (Descent and Distribution)	8

United State Code

Title 28, Section 1257	16
------------------------------	----

RULES

United States Supreme Court

Rule 15.6	16
-----------------	----

PUBLICATION

<u>ABA/BNA Lawyers Manual on Professional Conduct: Expert Testimony, 074-4050/84/80 p. 301:126 (1984)</u>	6
---	---

PETITION FOR WRIT OF CERTIORARI
ON APPEAL
TO THE SUPREME COURT OF GEORGIA

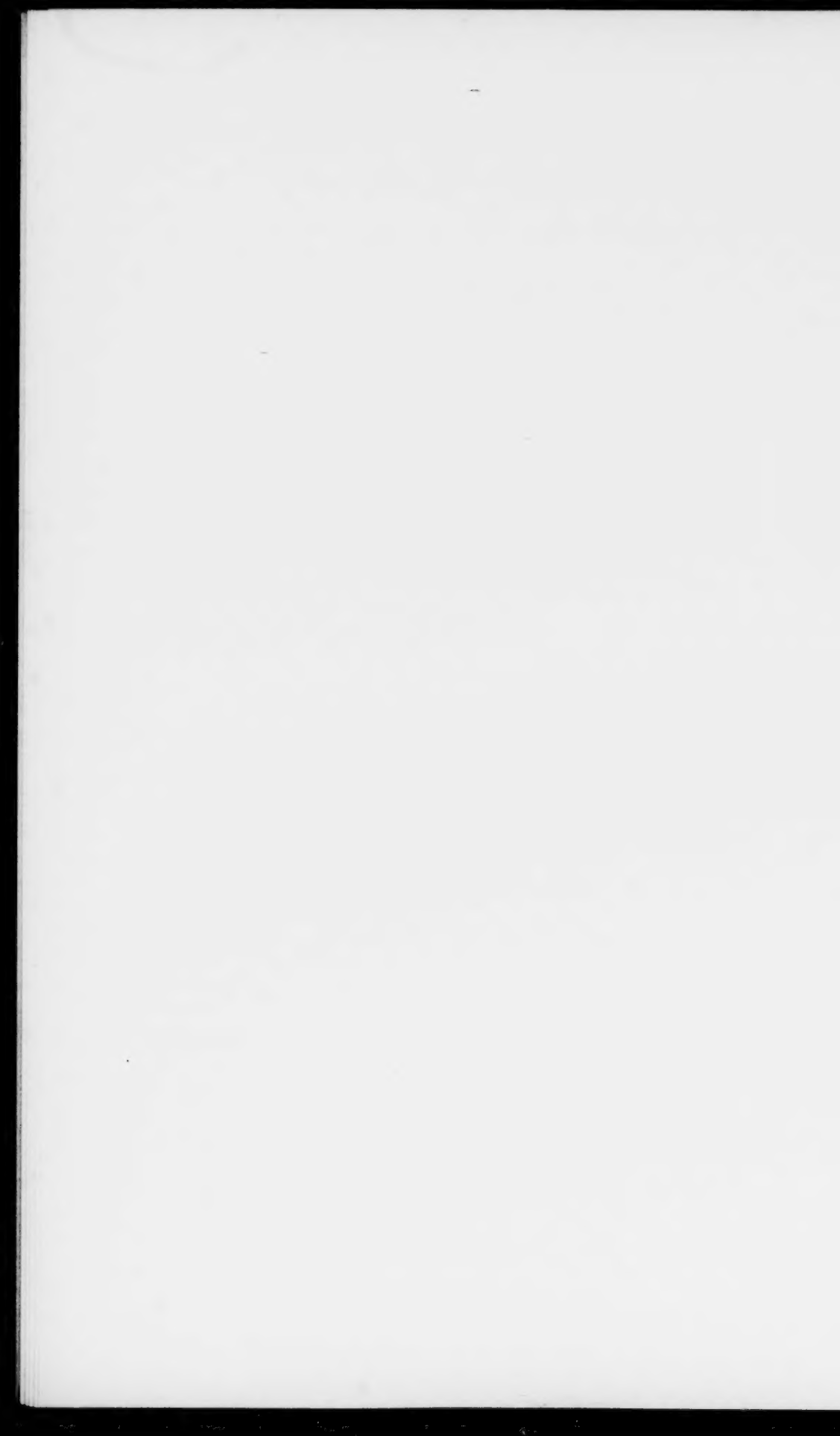
REPLY BRIEF

Respondents have incorrectly stated that decedant was participating in an air show. In fact the decedant was invited to ride in Mr. Claxton's unsafe airplane while Mr. Claxton participated in the air show. (Respondents Brief p.2).

Respondents state that their investigation of the wrongful death was thorough. Petitioners assert that this is highly suspect in view of the evidence presented by the Petitioners in their reply to Respondents motion for summary judgment as to the thoroughness of the investigation of the wrongful death case. The investigation was not thorough (Respondents Brief p.2)(R 282-292).

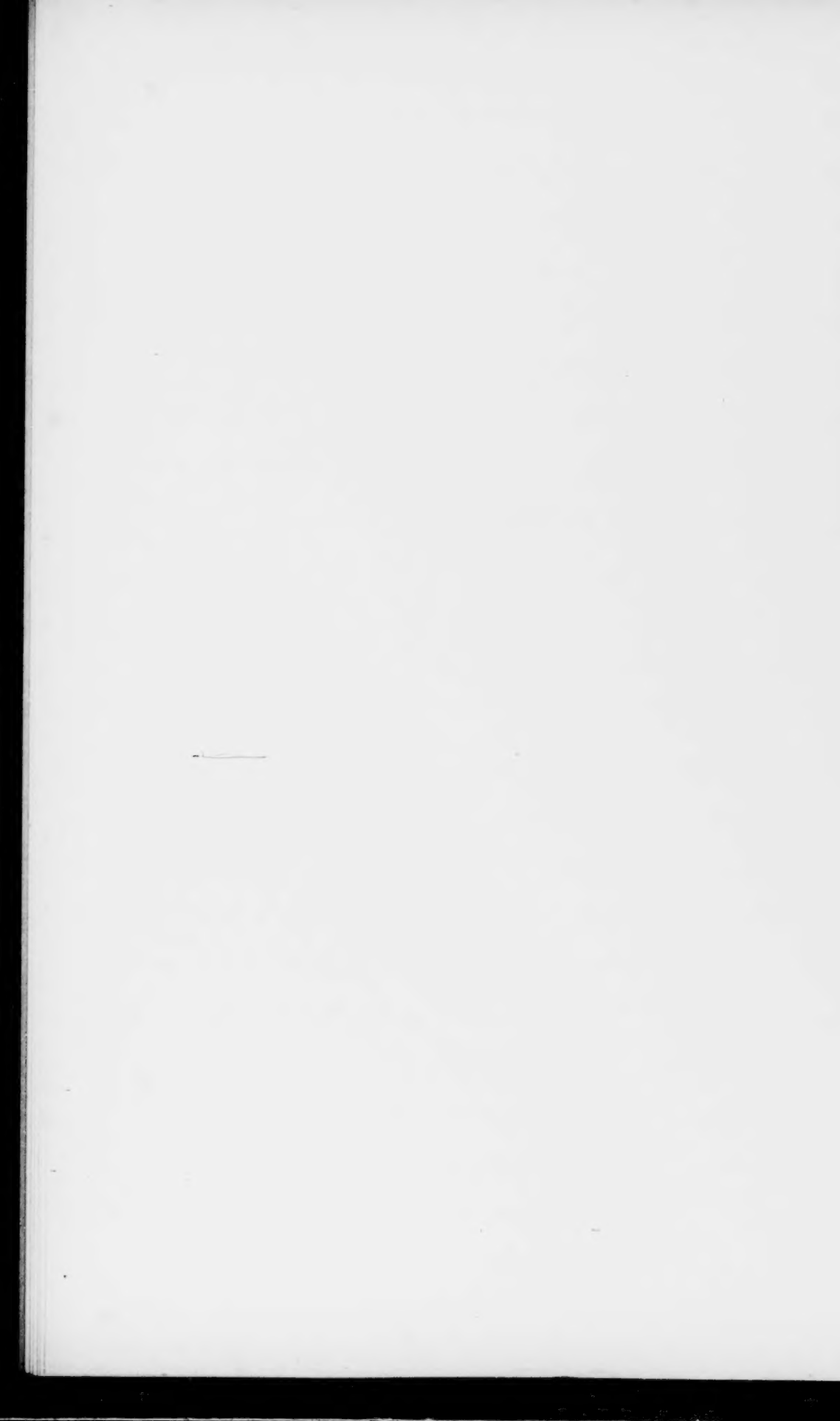
Respondents counsel state that Partitioners never asked Ms. Meroney or her firm to

perform any legal services for them and had no contact with them relevant to the instant law suit. It is clear from the record that this is not correct. The record contains a letter to Mr. Joe Kothe from the Petitioners asserting their rights in the wrongful death of their son (R 353). The letter was forwarded as an attachment to a letter Mr. Kothe sent to Ms. Meroney concerning the estate of the decedant (R 351-352). Additionally, telephonic communication between Petitioners counsel, James Thompson, and Respondent Meroney (R 377-382) shows evidence of (1) Petitioners attorney's notification to the Respondent Meroney of the necessity to protect Petitioners legal rights in the wrongful death suit, as well as (2) collusion between Respondent and Petitioners counsel Thompson. Three days after his telephonic conversation with Meroney, Thompson dismissed Petitioners wrongful death suit with prejudice (R 402). Petitioners attorney told them that he would dismiss and their legal rights would be protected by the Respondents in the wrongful death suit



they, the Respondents, had filed in Georgia. Seven months later, Petitioners learned that the Alabama and Georgia wrongful death suits had been dismissed with prejudice for the paltry sum of \$100,000 (insurance proceeds). Then it was too late for Petitioners to file in the respective courts in order to protect their rights in the wrongful death suits. However, under the Alabama Code on wrongful death and descent and distribution, the Petitioners were provided with the right to bring the instant negligence suit against the Respondents in the Georgia courts.

In their brief, Respondents state that the Petitioners were represented by legal counsel consistently and independently at all times. Respondents further stated that Petitioners rights were protected by attorneys other than Respondents at all times. Both of these statements are incorrect. In fact what actually occurred was that Respondents would collude with Petitioners attorneys leaving them at critical times trying to protect their rights Pro Se (R 377-382, R 497).



Unfortunately, Petitioners found it necessary to file various proceedings against the administratrix, Anne Horn. The Respondents breached their contract with the administratrix in failing to collect for the full value of the decedant's life; failed to place the amount due for conscious pain and suffering, plus funeral expenses, into the estate for all legal heirs and additionally charged an exorbitant amount (\$42,000) for collecting an insurance policy; failed to pay decedant's debts (Petitioners educational loan) prior to filing a wrongful death suit as required by Georgia law.

Because Respondents did not act in good faith, competently and diligently with a reasonable degree of care and skill in protecting the legal rights of the decedant and all his legal heirs, this course of action for negligence was necessary.

Petitioners action alleging legal malpractice by the Respondents clearly raised questions of federal law. The trial court erred when it granted Respondents motion for



summary judgment, thus Petitioners were denied due process of law by the Georgia courts in violation of the United States Constitution.

Respondents misstated the fact concerning an affidavit by an expert. At the time of filing of the complaint for legal malpractice, by the Petitioners (June 9, 1987), there was no requirement for an affidavit from an expert witness for the Petitioners. In their reply to the Respondents motion for summary judgment, the Petitioners filed two affidavits supporting their assertion of malpractice (R-319-339).

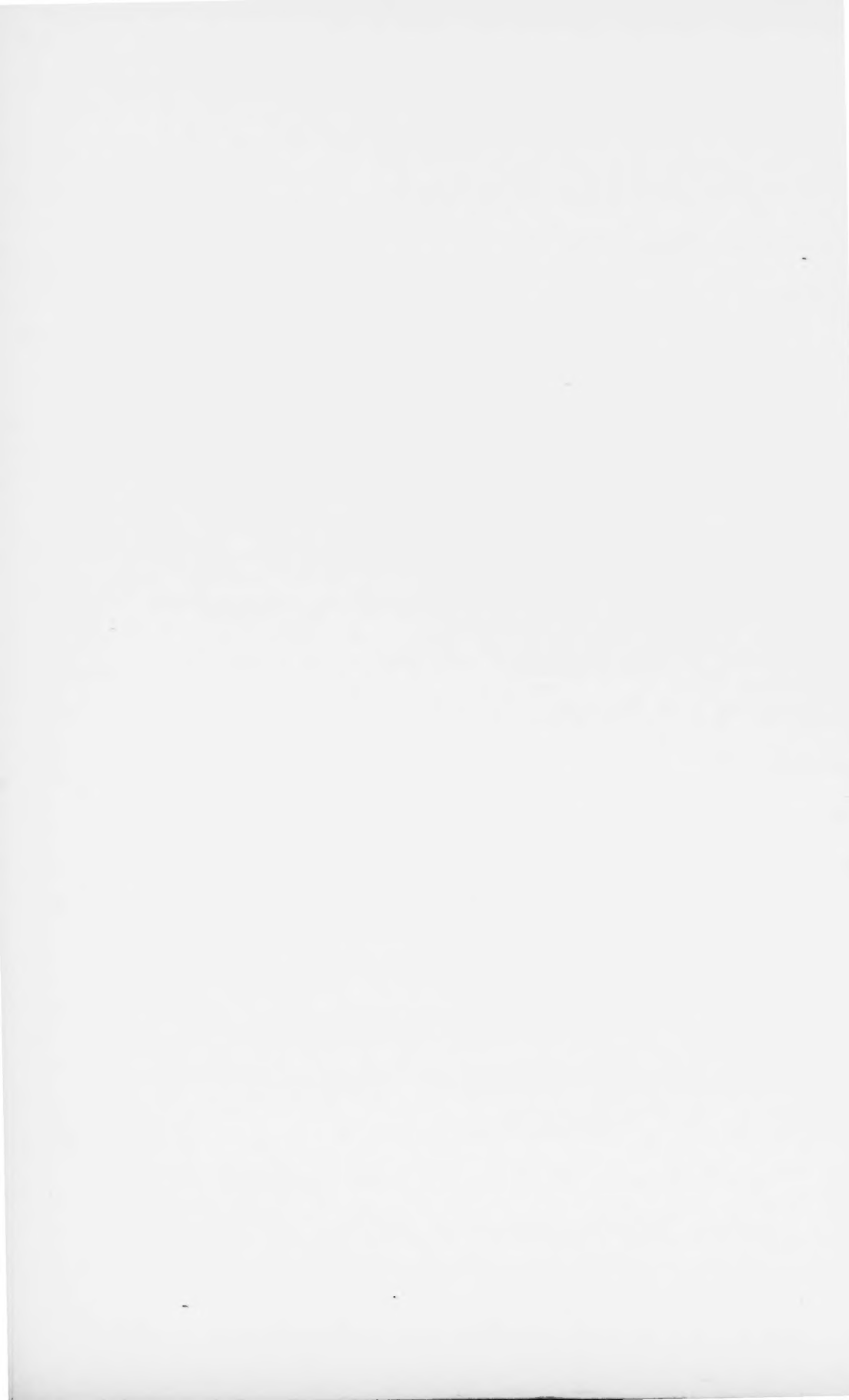
Respondents Meroney's affidavit and that of her co-counsel were more than adequately rebutted by Petitioners(R-319-339). The presumption that the legal services were performed in an ordinarily skillful manner was properly rebutted by the affidavits submitted by Petitioners. There was therefore not sufficient justification for the granting of the motion for summary judgment.

The two affidavits Respondents filed in support of the motion for summary judgment were affidavits by (1) the Respondent Meroney

and (2) the Respondents' co-counsel, Percilla. It is difficult to believe that either of the affidavits would be any different than the assertion that they did use due care. No attorney would admit that he erred in such a set of circumstances. To do so would be tantamount to admitting legal malpractice.

In the discussion on expert testimony, the ABA/BNA Lawyers Manual on Professional Conduct states, "The majority approach (by courts) is that expert testimony is required to establish a breach of the standard of care, unless the nature of the alleged breach is such as to be within the ordinary experience and understanding of laymen (Petitioners emphasis). This approach recognizes that some types of conduct are so obviously and flagrantly substandard as to render expert testimony superfluous and burdensome". ABA/BNA Lawyers Manual on Professional Conduct: Expert Testimony, 074-4050-84/80, p. 301: 126 (1984).

Petitioners submit that the examples of the type of investigation conducted by the

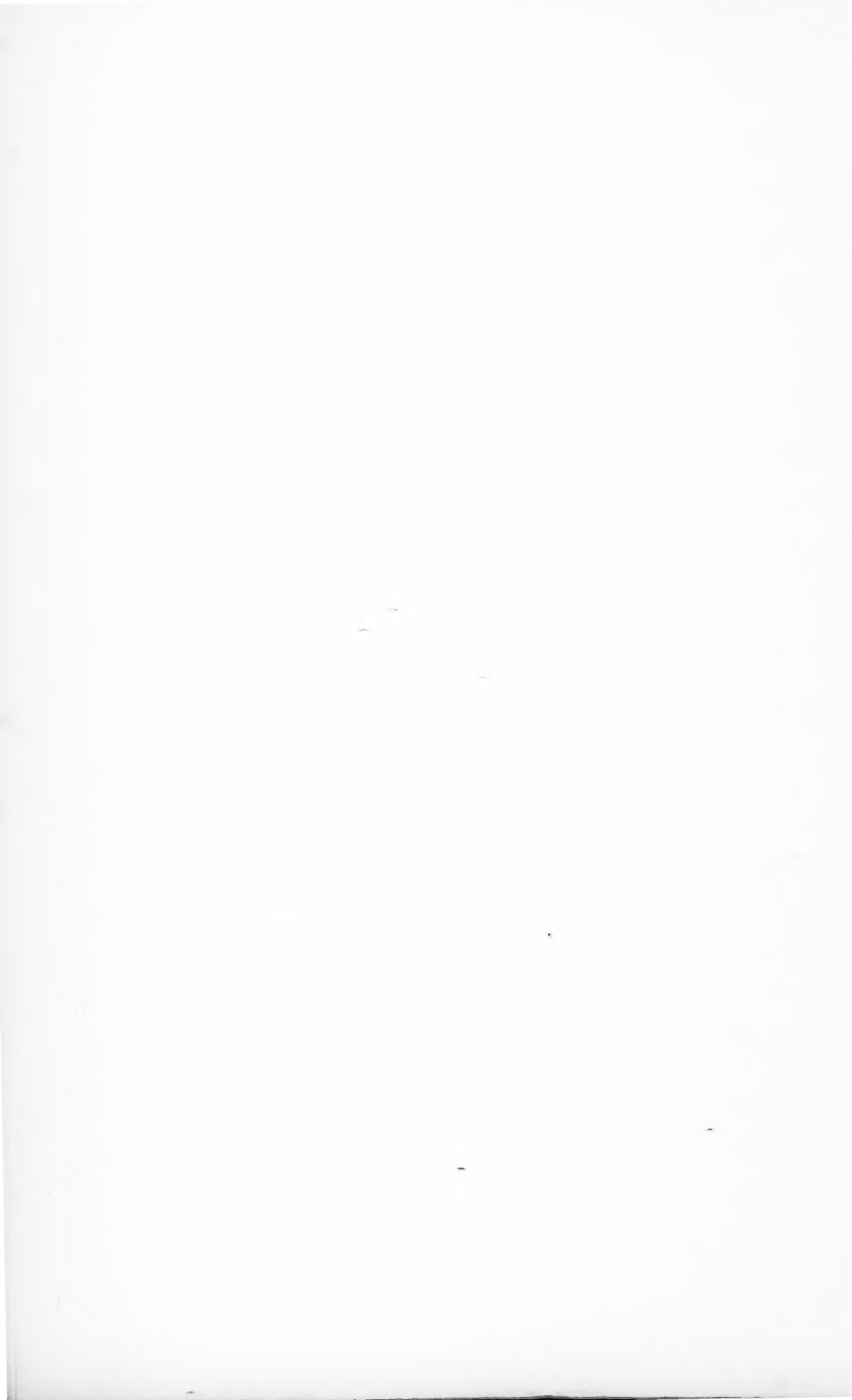


Respondent and her co-counsel are more than adequate to demonstrate their failure to use due care (R 282-292).

Petitioners have consistantly stated that no attorney/client relationship had existed between the Petitioners and the Respondents but under the concept of "lex loci delecti" and the Doctrine of Comity, the Respondents owed a duty of due care flowing through the administratrix to protect the interests of the legal heirs, Petitioners, and other beneficiaries (R 277-282). When the trial court found the Respondents acted with the requisite degree of care, skill and diligence, it apparently ignored the evidence submitted by the Petitioners thus violating the Due Process Clause of the 14th Amendment of the Constitution.

ARGUMENT

Petitioners were denied due process of law. The Georgia courts violated the Due Process Clause of the 14th Amendment of the Constitution when they granted Respondents motion for summary judgment and denied a petition for writ

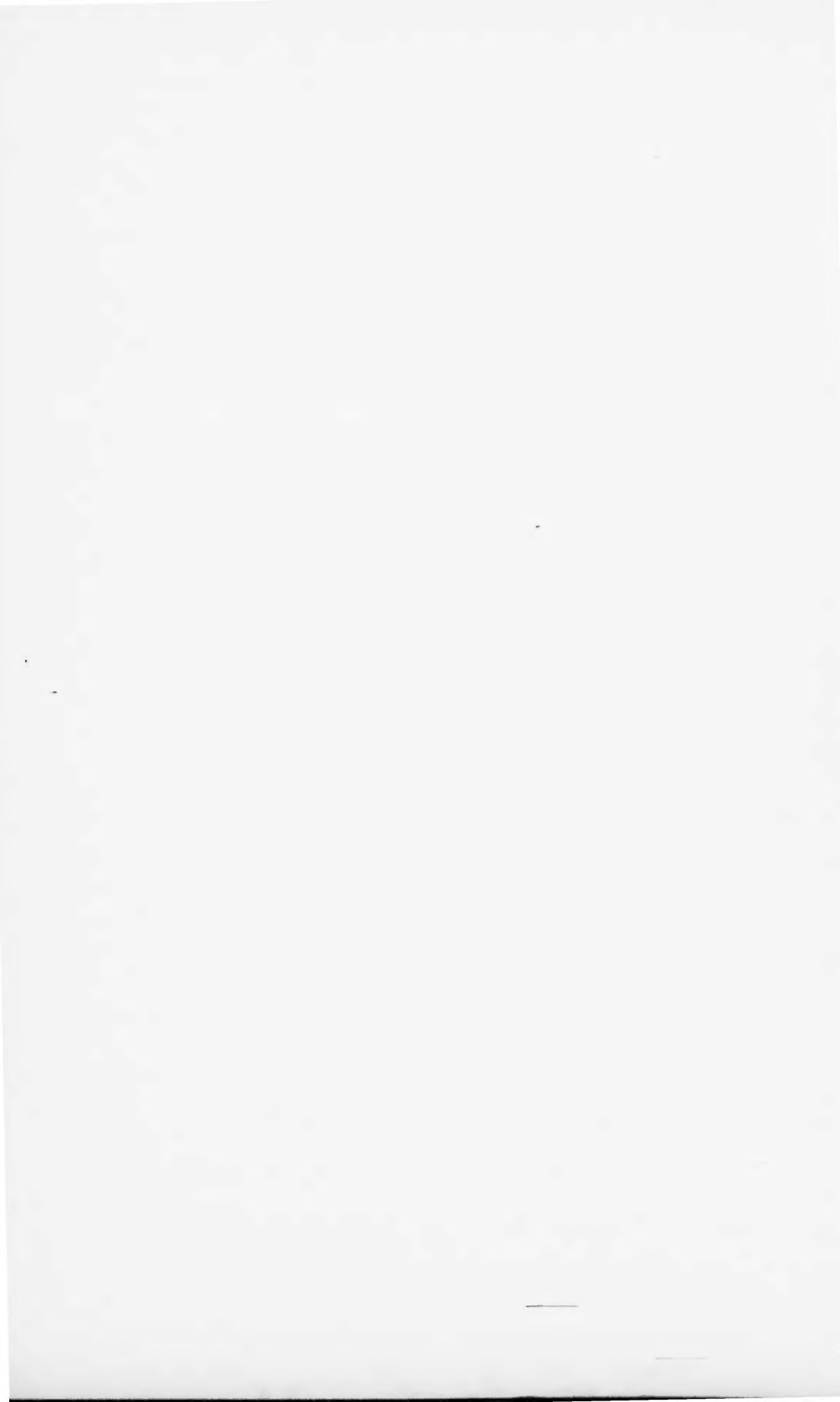


of certiorari. Respondents injured Petitioners by depriving them of property and engaging in willful and wanton negligence in their failure to get a judgment for the full value of the decedant's life, as well as, failing to apply the Wrongful Death and Descent and Distribution statutes of Alabama. Code of Alabama 1975, Section 6-5-410 (Wrongful Death) and Section 43-8-41 et seq (Descent and Distribution).

In the area of conflict of laws, the Due Process Clause prevents an arbitrary application of a state's jurisprudence to an out of state event. Pearson v. Northeast Airlines, Inc., US Ct of App, 2nd Ct. Nov. 8, 1962; 309 F 2d 553, 92 ALR 2d 1162.

Rule 10.1 of the Rules of this Court outlines the considerations governing the review on certiorari to a state court of last resort. The rule provides that a petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

There are special and important reasons for granting certiorari in this case. A state court had ignored an important question of federal



law, specifically, the conflict of laws between two states. Knight v. Wingate, 205 Ga. 133, 52 SE 2d 604 (1949). The issues involved have a continuing future consequence. Citizens of one state should not be ignored by the courts of another state simply because the courts do not desire to face the issues raised by the citizens of another state. This is especially true in the application of "lex loci delecti" and the Doctrine of Comity between sister states. . The issues of conflict of laws and the Due Process Clause of the 14th Amendment of the Constitution effects the citizens of every state of the union. The issues are not "narrow" or "episodic"but in fact are universal.

At the time of filing their complaint (June 9, 1987) there was not a statute in Georgia requiring expert testimony by the Petitioners. However, Petitioners did file two affidavits supporting their assertion of malpractice (R 319-339).

Further, the Georgia courts were in conflict with Georgia case law. Knight v. Wingate,

205 Ga. 133, 52 SE 2d 604 (1949)(See Contracts 187 (1) and the Due Process Clause of the 14th Amendment of the Constitution.

Respondents reference to the Georgia Code OCGA Section 9-11-9.1 brushes very quickly and lightly over the fact that the statute was effective on July 1, 1987 which was three weeks after the Petitioners filed their complaint.

Petitioners affidavits, filed on July 18, 1988 (R 319-339) carry as much weight as the affidavits of the two attorneys whose conduct is in question. The affidavits clearly are not objective and unbiased regarding their own investigative efforts (R 174-192).

When the concept of "lex loci delicti" and the Doctrine of Comity are applied under Alabama law (situs of the tort) and the Alabama Code for wrongful death and descent and distribution prevail, the Petitioners become heirs at law and beneficiaries with the right of action to bring suit against the Respondents who deprived them of property and wantonly neglected to handle the decedant's estate properly.

The trial court erred in granting Respondents motion for summary judgment on the basis of no issues of material fact. This action has merit to be heard by a jury especially when the trial court's order pointed out that the facts of the case are convoluted (R 558). Webster's New World Dictionary, 2nd Ed. p. 311, defines convoluted as, "extremely involved, intricate and complicated.

Because there is conflict of laws with regard to wrongful death and descent and distribution between the states of Alabama and Georgia, it is essential that a review of the factual record be carried out by the Court.

Petitioners insist that the choice of law issue and the deprivation of due process questions are meritorious. The choice of law on the underlying wrongful death action was relevant because the laws of Alabama, as the situs of the tort, must prevail and the Respondents had a duty of due care to Petitioners as heirs at law and beneficiaries of the decedant's estate.

By the Respondents making the decision



that Georgia law applied and the Georgia courts upheld that decision, the Respondents, and the Georgia courts, violated the Petitioners rights of due process under the 14th Amendment of the Constitution. The expert testimony just served to cover up the violation of Petitioners rights.

Respondents expert testimony, their own affidavits, obviously supported their contention that Georgia law, and not Alabama law, applied. Their testimonies presented through their own affidavits would hardly be anything but supportive since to testify any other way would destroy their own position.

It is apparent that genuine issues of material fact existed and the motion for summary judgment was improperly granted.

Finally the Petitioners were deprived of due process of law by the Georgia courts rulings because:

a. Alabama law must prevail because of "lex loci delicti" and the Doctrine of Comity. Southern R.R. Co. v. Decker, 5 Ga App 21, 62 SE 678 (1908); Gulf Col-lateral Inc. v. Morgan, 415 F. Supp. 319

(1976).

b. The Georgia courts ignored the existence of a conflict of laws between Georgia and Alabama. Code of Alabama 1975, supra, and Code of Georgia 1981, OCGA Section 51-4-1 (Wrongful Death) and Section 53-4-1 (Descent and Distribution).

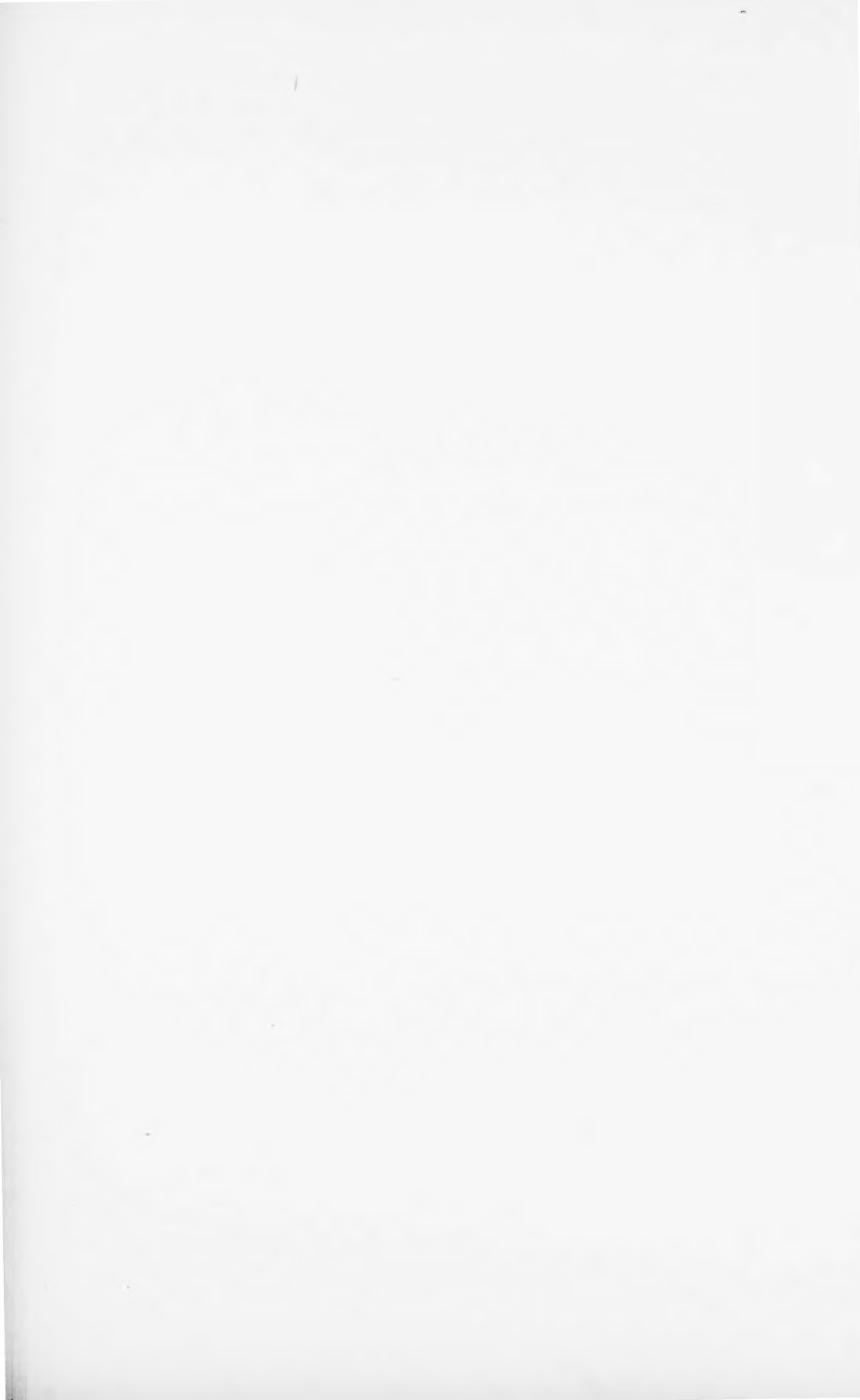
c. The charge of negligence of an attorney is a matter for a jury and the granting of a motion for summary judgment by the trial court was inappropriate and conflicted with Georgia case law. Wakefield v. A.R. Winter Company, 121 Ga. App. 259; 174 SE 2d 178 (1970); Ellington v. Tolar Construction Co. 237 Ga 235, 227 S.E. 2d 336 (1976).

The circumstances of this case amply justify the issuance of a writ of certiorari. Petitioners have been denied Due Process under the 14th Amendment of the Constitution.

CONCLUSION

Petitioners reasons for the petition are as follows:

a. The courts of Georgia refused to ad-



dress the issues of "lex loci delicti" and the Doctrine of Comity thereby failing to impose "full faith and credit" of a sister state's statutes involving wrongful death and descent and distribution.

b. The courts of Georgia ignored the fact that a conflict of laws exists between two states and failed to determine and protect the interests of the legal heirs at law, residents of Alabama, when they granted a motion for summary judgment and denied a writ of certiorari to Petitioners.

c. The trial court granted a motion for summary judgment when the Petitioners alleged negligence by the Respondents; thus denying Petitioners the right to due process of law and conflicting with Georgia case law.

There is presented a special and important reason for review because such circumstances, as occurred in this case, do occur frequently in this age of mobility. It can and does happen in any of the states of the union.



The issue was addressed specifically as far back as 1908 in Southern RR v. Decker (supra) and as recently as 1976 in Gulf Collateral Inc. v. Morgan (supra) but the Respondents and the courts of Georgia failed to face the issue.

Because of the narrow view of the trial court and subsequent decisions by the appellate courts of Georgia, Petitioners have been denied their due process of law.

For these reasons, Petitioners pray this honorable Court to grant the instant petition for writ of certiorari.

Respectfully submitted,

George M. Horn
GEORGE M. HORN, PRO SE

Ferrell S. Horn
FERRELL S. HORN, PRO SE

(Counsel of Record)

308 Brookside Drive
Auburn, Alabama 36830
(205) 821-3616

Susan Smitherson

DATED: July 23, 1990

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
LEE COUNTY, ALABAMA
BY CLERK OF COURT JULY 22 1990



AFFIDAVIT

I, George M. Horn, hereby certify that I have presented this REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI under the authority of the United States Code, Title 28 Section 1257 and according to Rule 15 of the Rules of the Supreme Court of the United States. The statements made in this brief are made under the pains and penalties of perjury.

George M. Horn

GEORGE M. HORN

Pro Se

308 Brookside Drive

Auburn, Alabama 36830

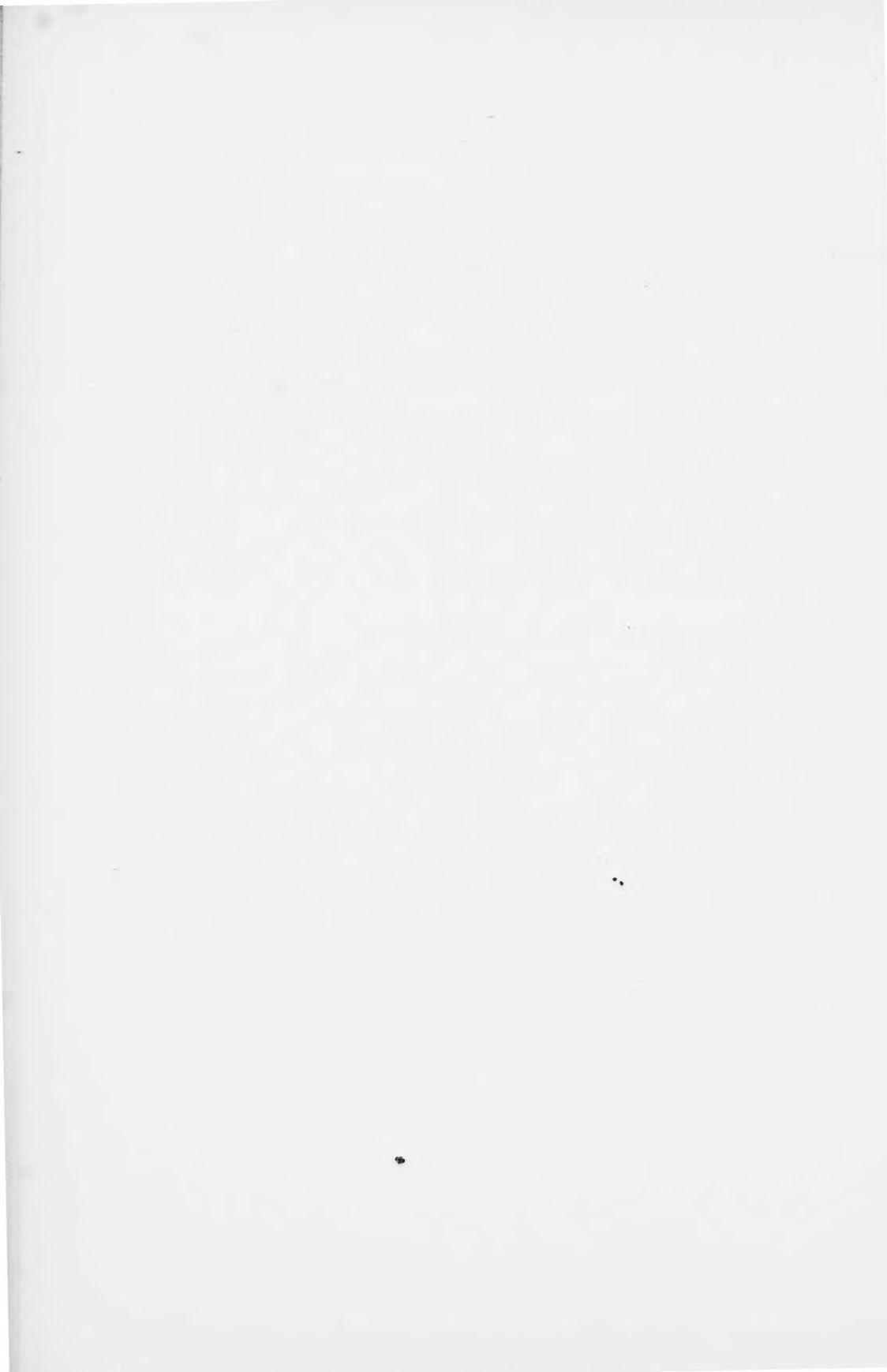
Susan Ashler Smitherman

SUSAN ASHLEY SMITHERMAN, NOTARY PUBLIC

LEE COUNTY, STATE OF ALABAMA

MY COMMISSION EXPIRES 11-22-93

Dated: July 23 1990



AFFIDAVIT

I, Ferrell S. Horn, hereby certify that I have presented this REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI under the authority of the United States Code, Title 28 Section 1257 and according to Rule 15 of the Rules of the Supreme Court of the United States. The statements made in this brief are made under the pains and penalties of perjury.

Ferrell S. Horn
FERRELL S. HORN

Pro Se

308 Brookside Drive

Auburn, Alabama 36830

(205) 821-3616

Susan Smitherman

SUSAN ASHLEY SMITHERMAN (NOTARY PUBLIC)
LEE COUNTY, STATE OF ALABAMA
MY COMMISSION EXPIRES 12/31/91

Dated: July 21 1990



CERTIFICATE OF SERVICE

We, George M. Horn and Ferrell S. Horn,
hereby certify that three true and correct cop-
ies of the foregoing REPLY BRIEF have been
served on:

Karen B. Bragman
ARNALL, GOLDEN & GREGORY
55 Park Place, Fourth Floor
Atlanta, GA 30335

by depositing the same in the United States
mail in a properly addressed envelope with
sufficient postage.

This 23rd day of July 1990.

Respectfully submitted,

George M. Horn

George M. Horn, Pro Se

Ferrell S. Horn

Horn, Pro Se

SUSAN ASHLEY SMITHERMAN
LEE COUNTY, STATE OF ALABAMA
MY COMMISSION EXPIRES 12/22/93

Susan Smitherman

308 Brookside Drive
Auburn, AL 36830
(205) 821-3616